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Foreign Participation in United States Banking: Regulatory Myths and Realities

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FOREIGN PARTICIPATION IN UNITED STATES BANKING: REGULATORY MYTHS AND REALITIES†

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I. INTRODUCTION

On February 1, 1973, the United States central bank,¹ the Board of Governors of the Federal Reserve System (The Board),

† Special thanks go to Ms. Helen Wolcott of the Public Information Office of the Board of Governors of the Federal Reserve System, who, by her interest in and efforts for those seeking to utilize the Board's procedures for providing public access to its materials, makes a reality of Congress' intentions in the Freedom of Information Act.

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¹ The Board of Governors of the Federal Reserve System, established under the title

announced the creation of a System Steering Committee on International Banking Regulation to study the "structural aspects of U.S. activities of foreign banks and foreign operations of U.S. banks."² The announcement was hardly surprising. Quite apart from any suspicion of the role that foreign banks operating in the United States³ might have played in the huge sweep of dollars to Germany in the monetary crisis of the spring and summer of 1971, and the even more extensive dollar outflows in January 1973, the growth of foreign-owned banking institutions in the United States since 1965 would have led any self-respecting bureaucracy to consider adding this prospering child to its tutelage.⁴ What is surprising is that at the

"Federal Reserve Board" by the Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 (codified at 31 U.S.C. § 409 (1970) and in scattered sections of 12 U.S.C.), is not precisely a central bank, but, under a novel system of supervision over twelve regional Reserve Banks, performs central banking functions of monetary control as well as supervisory regulation of those private commercial banks and bank holding companies entrusted by Congress to its bailiwick. However, under a system of federal banking regulation which has grown haphazardly, the Comptroller of the Currency and the Federal Deposit Insurance Corporation also have supervisory jurisdiction over groups of commercial banks. For a complete description of the historical development of the spheres of jurisdiction of the three agencies and a fascinating picture of just how senselessly complex federal regulation of commercial banking is, a two-part article by Howard H. Hackley, former General Counsel of the Board, is invaluable. See Hackley, *Our Baffling Banking System*, 52 Va. L. Rev. 565, 771 (1966).

² 59 Fed. Res. Bull. 123 (1973).

³ Like all legal entities operating transnationally, foreign banks may choose to penetrate the United States market either by a direct extension of the foreign corporate entity in the form of a United States office or United States offices, or by the establishment of a separate entity or entities, that is, subsidiary banks chartered under state or federal law. However, unlike industrial establishments, the foreign bank must receive a license from a supervisory authority before it may engage in depository banking. If the direct route is chosen (and only eight states make any provision in their banking statutes for licensing of offices of foreign banks), the foreign bank offices are referred to variously as "branches," "agencies," or "representative offices," generally depending upon the usage in the state statute under which the office is licensed. The term "representative office," however, has a functional meaning, generally referring to an office which does not itself conclude contracts so as to subject it to process and taxation within the jurisdiction. The New York statute under which foreign banks are licensed to do business in New York distinguishes between a "branch" and an "agency" by the ability to take demand deposits from the public. However, "agencies" hold funds for customers in such a way that they probably are required by 12 U.S.C. § 378(a)(2) (1970), discussed in text at notes 27-29 *infra*, to be licensed by a supervisory authority. A "representative office" does not itself conduct business in such a way as to require licensing under the federal statute. California, however, requires a permit even for such minimal presence. For an exact delineation between agencies, branches and representative offices as utilized by United States banks abroad, see S. Robinson, *Multinational Banking* (1972). The different consequences for a foreign bank of a particular choice of form of entry are described in detail in a study by Professor Jack Zwick for the Joint Economic Committee of Congress. See Joint Economic Comm., 89th Cong., 2d Sess., *Foreign Banking in the United States* (Economic Policies and Practices, Paper No. 9) (Comm. Print 1966) [hereinafter cited as Zwick].

⁴ Since there is no overall federal supervision of foreign bank entry into the United States, there is no central repository for statistics with respect to foreign bank presence in the United States, and published figures must be regarded as estimates. However, the tremendous growth of their presence over the past five years is readily apparent. Richard P. Cooley, President of the Wells Fargo Bank in San Francisco, estimated in 1973 that there were more

moment there is no federal statute specifically subjecting to central bank supervision the establishment and conduct of banking⁵ offices in the United States by nonnationals of the United States.⁶ While

than 430 foreign-controlled banks, agencies, branches or representative offices in this country, as compared to 175 in 1965. *Wall Street Journal*, May 10, 1973, at 1, col. 6. The *New York Times*, in a lead article on the growth of foreign bank presence in the United States, estimated total foreign banking assets in the United States in mid-1972 at \$23 billion. *N.Y. Times*, Oct. 8, 1972, § 3, at 1, col. 1. The Zwick study, in comparison, had reported only \$7 billion in total foreign banking assets for the end of 1965. See Zwick, *supra* note 3, at 1.

⁵ With the use of this term, "banking," we encounter a definitional problem which plagues any lawmaker—state or federal—who sets out to regulate "banking": What is the business of "banking"? The Canadians ten years ago decided to exclude aliens from Canadian "banking" and, having first amended their commercial bank statute, soon found that the dike against foreign control of the nation's financial intermediators had to include exclusion from trust companies, loan companies, finance companies, etc. See *Can. Rev. Stat.* ch. 40, §§ 30, 38, ch. 87, § 53(1) (1970). Hackley, *supra* note 1, met the definitional problem by discussing only the regulation of commercial banks:

The term "commercial bank" . . . [means] a corporation that engages in the business of receiving demand deposits subject to check although it may also accept "time" and "savings" deposits not subject to check. . . . Unless otherwise specifically indicated, the term "bank" . . . means only a commercial bank and does not include such institutions as mutual savings banks, savings and loan associations, insurance companies, finance companies, and other financial institutions that compete in some respects with banks but do not meet the traditional concept of a commercial bank.

Id. at 565 n. 1. However, this definition is too narrow to cover the variety of modes of operation in the United States financial markets utilized by foreign institutions. As stated in note 3 *supra*, such modalities include "agencies" which, unlike "branches" and commercial bank subsidiaries, do not take demand deposits from the public, although they may hold credit balances for customers. Moreover, a foreign institution may do business in New York through the establishment of a subsidiary, a so-called investment company, chartered under a special provision of the New York State Banking Law. An investment company may not take deposits from the general public but may otherwise exercise what would be thought of as traditional "banking" powers. See text at notes 267-72 *infra*. When one discusses "foreign banking" in the United States, the parameters are not defined only by deposit gathering.

The most recent attempt at regulation of foreign entry into the United States banking market, Rep. Patman's bill, H.R. 11,440, 93d Cong., 1st Sess. (1973), introduced on Nov. 13, 1973, would "solve" the problem of definition of foreign-owned banks by outlawing branches and agencies, and permitting the Secretary of the Treasury to "deem" any United States (state or federal) bank chartered to be a bank subject to the Draconian requirements of the bill if more than 5% of its voting stock is owned by foreign persons. For a full description of the bill, see text at notes 148-52 *infra*. In any event, when this article uses the term "foreign-owned institution" or simply "foreign bank," it means United States arms (whatever the legal form) of entities that are classified as "banks" under the law of their place of incorporation and United States incorporated "banks" that are in fact controlled by non-United States persons.

⁶ The Second Annual Report of the President's Council on International Economic Policy [hereinafter cited as Report of the President's Council], which devotes Chapter 4 to "U.S. Banking and Securities Regulation—Some Consequences for International Financial Competition," prefaces its remarks with the observation:

Because of the great importance of financial institutions to any industrialized economy, governments in all countries regulate and supervise their market operations. Banks, investment banks, brokerage firms and insurance companies all operate within a comprehensive framework of state and Federal laws and regulations designed to protect the vitality of the financial industry and the economic security of those that it serves.

Wash. Fin. Rep. at T-1 (Feb. 18, 1974). It is perhaps a measure of the United States government's insularity of viewpoint on transnational financial phenomena that it had not

foreign entry by means of establishment or acquisition of a "bank" is regulated by the Board under the Bank Holding Company Act of 1956 (the Act), as amended by the Bank Holding Company Act Amendments of 1970 (the 1970 Amendments),⁷ the scheme of regulation of that Act was never intended to deal with transnational interpenetration of financial markets, and the statute offers the Board no real guidance toward an integrated policy of foreign bank regulation. Even if the provision of the Act permitting separate treatment of certain aspects of foreign ownership were a better guide to policy, the Act would not permit an integrated scheme of federal regulation of foreign entry: as "bank" is defined by the Act,⁸ only the acquisition of voting interests in commercial banks incorporated under state or federal law is covered. Since the opening of a United States office of a foreign corporation does not involve the acquisition of stock, the Act does not give the Board any supervisory authority over direct entry (as opposed to the chartering of a separate entity), through the establishment of bank branches, agencies or representative offices. Nor is the acquisition of interests by foreign banks in financial institutions (such as New York investment companies) that do not fall within the Act's definition of "bank" covered by the Act unless the foreign bank is already subject to the Act because of ownership of a United States "bank."⁹

In such an intensively regulated field as banking, the anomaly presented by the lack of federal control over foreign bank entry has not gone totally unnoted. At the urging of Senator Jacob Javits¹⁰ of New York, the Joint Economic Committee of Congress in 1966 engaged Professor Jack Zwick of the Graduate School of Business of Columbia University to prepare a study of foreign bank operations in the United States. A special study was needed because "[i]n spite

occurred to the executive branch before 1973 to study the impact of this domestic regulation on international financial competition. Only in the 1974 State of the Union message did the President announce that the Administration is "studying the competitive position of foreign banks within this country and of American banks abroad to make sure that discriminatory regulations do not prevent American banks and other financial institutions from doing business they are entitled to do." Wash. Fin. Rep. at A-10 (Feb. 4, 1974).

⁷ 12 U.S.C. §§ 1841-50 (1970). The Act was extensively overhauled by Pub. L. No. 91-607, 84 Stat. 1760 (1970).

⁸ 12 U.S.C. § 1841(c) (1970).

⁹ See text at notes 139-41 *infra*.

¹⁰ Senator Javits' concern would seem not to have been the lack of regulation, but rather the lack of opportunity for entry under a system whereby state authorization for the branch or charter had to be obtained. Senator Javits' constituency includes two of the three largest United States banks, First National City Bank and The Chase Manhattan Bank, N.A., both with extensive foreign operations. To the extent that foreign countries only permit United States bank entry on a reciprocal basis, these banks have considerable interest in supporting freedom of access to the United States for foreign banks. See Zwick, *supra* note 3, at 4, for a description of the participation by these banks in the liberalization of the New York Banking Law in 1960 so as to authorize foreign branch entry.

of the extensive Federal interest in such [foreign bank] operations, which affect the balance of payments, as well as our international commercial relations, there is very little information on these operations available."¹¹ In the absence of published data, Dr. Zwick interviewed officers of the foreign bank offices and held discussions with the various governmental departments concerned with foreign bank operations. The study noted the irony, in view of the importance attached to international monetary conditions in the 1960's, of a state of affairs in which the activities of foreign branches and agencies "have been examined only by State authorities who are largely uninterested in the inflow-outflow implications of the [foreign] banks' activities."¹² The study concluded that it would be in the public interest for Congress to "provide for the Federal examination and supervision of foreign banks so that foreign policy and the broader national and international implications of foreign bank activities can be adequately appraised."¹³ The study also recommended that the National Bank Act¹⁴ be amended to authorize the licensing of foreign agencies and branches by the federal government as a response to the problems of reciprocity being faced by the United States banks moving abroad.

The study was transmitted to the Joint Economic Committee on July 5, 1966. However, the next event with respect to federal regulation of foreign bank entry apparently was triggered not so much by Dr. Zwick's analysis as by the dramatic closing of the New York branch of Intra Bank, S.A., and the consequent realization by the banking community of just how involved—with minimal supervision—Intra Bank, S.A., had been in the New York money market.¹⁵ On August 25, 1966, Senator Javits introduced S. 3765¹⁶

¹¹ Letter of transmittal of Zwick study from Wright Patman, Chairman of the Joint Economic Committee, to Members of the Committee, July 5, 1966, in Zwick, *supra* note 3, at III.

¹² Zwick, *supra* note 3, at 26.

¹³ *Id.* at 27.

¹⁴ Ch. 343, 18 Stat. 123 (1874) (codified in scattered sections of 5, 12, 18, 19, 28 and 31 U.S.C.).

¹⁵ Klopstock, *Foreign Banks in the United States: Scope and Growth of Operations*, in *Monthly Rev. of Fed. Res. Bank of N.Y.* 140 (June 1973), contains a full description of the activities of foreign banks' offices in New York money market operations and notes the advantage to foreign banks' offices of freedom from the reserve requirements imposed upon domestic banks subject to its jurisdiction by the Board. The activity of foreign banks with United States offices and United States banks with foreign offices in arbitrage between the Eurodollar and the New York money market and the consequent effects upon problems of national monetary policy cannot be treated within the scope of this article. Even the Board had limited its Steering Committee study to exclude review of "the volume and types of international flows of funds through such institutions." 59 Fed. Res. Bull. 123 (1973). However, apparently the large money center United States banks subject to the Board's Regulations D and M (the regulations concerned with reserves against deposits) have begun to think about the competition from the foreign banks in this market. See Wash. Fin. Rep. at

to provide for federal control over foreign banking corporations operating within the United States, but the bill was never reported out of the Committee on Banking and Currency to which it was referred. Four subsequent bills—three introduced in 1967 and one in 1969, three in the House (two introduced by Representative Patman and one by Representative Fino) and one in the Senate (by Senator Javits)—met the same fate.¹⁷ Until Representative Patman's latest proposal for regulation, H.R. 11,440,¹⁸ nothing more on the subject was heard in Congress. Moreover, probably because of the more visible changes taking place in the structure of the domestic industry, the unusual rate of growth in foreign entries went virtually unnoticed until the New York Times headlined the process in a lead article in its Sunday finance section entitled "Foreign Banks Flowering on U.S. Soil."¹⁹ Shortly thereafter, the Board announced the establishment of its System Steering Committee to investigate the activities of foreign banks in the United States. Since this announcement, the financial pages have regularly had a new event involving foreign bank entry to report: the Royal Trust Company of Quebec, in what should have been a routine acquisition of a comparatively small national bank in Miami, raised the specter of an out-and-out conflict between Board approval under the Bank Holding Company Act and Florida law; Barclays Bank of London applied to the Board and to the New York Banking Board for permission to acquire the shares of a major suburban retail banking institution, the Long Island Trust Company, and was flatly turned down by New York. On December 10, 1973, the Board announced its approval of the acquisition of First Western Bank and Trust Company of Los Angeles, a 1.4 billion dollar bank, by Lloyds Bank Limited of London, the fourth largest commercial bank in London.

It could be argued that the most recent acquisitions or proposals reflect simply an initial reaction to the relatively cheaper cost of United States investment as a result of the devaluations of the dollar, bankers being, of course, among the first positioned to take advantage of the investment implications of a devaluation. No

A-10 to A-11 (July 9, 1973), reporting that Rep. Henry Reuss has requested the House Banking Committee to hold hearings on foreign banking operations in the United States, noting, among other alleged discriminations against United States banks, the lack of parity in reserve requirements. Section 14 of the Patman bill, H.R. 11,440, 93d Cong., 1st Sess. (1973), would require the banks licensed under it to maintain the same reserves as member banks.

¹⁶ S. 3765, 89th Cong., 2d Sess. (1966).

¹⁷ See *Foreign Banks in the United States, A Study in Reciprocity* 34 (Sept. 27, 1972) (paper prepared for the Bankers' Association for Foreign Trade) [hereinafter cited as *BAFT Study*].

¹⁸ H.R. 11,440, 93d Cong., 1st Sess. (1973).

¹⁹ N.Y. Times, Oct. 8, 1972, § 3, at 1, col. 1.

doubt also, the increase in entry is a concomitant of the large increase in foreign investment in United States enterprises in recent years. Just as the major United States banks have followed their multinational customers abroad, so foreign bankers intend to be their customers' "man on the spot" in the United States.²⁰ Nevertheless, it is believed that the interpenetration of financial markets is more than a temporary phenomenon, and that this growth in foreign bank entry into the United States is a part of a global trend towards transnational banking²¹ which may be expected to continue. As the multinational banks already present in the United States seek to expand their operations here, and as those not yet present seek one or more opportunities for participation in both the United States domestic banking markets and the international banking markets on our coasts, the pressure for, and the need for, an articulated federal policy toward integration of our complex schema of banking regulation and foreign bank entry will increase. This article will attempt to describe, in some detail, the morass of legislation and regulation, both state and federal, presently applying to foreign bank entry, and will suggest some considerations that might inform proposals for legislation aimed at specific, not backhanded, federal regulation of the phenomenon. To penetrate the morass, however, it is best to start with a contour map: a description of the characteristics of United States banking regulation that would seem most striking to a foreign bank lawyer observing our system (or lack thereof). These characteristics also are ideological in character; that is, the principles are norms which, as we shall see in the analysis of Board decisions on foreign bank entry under the Act, the Board, in the absence of any congressional directive on the subject, has utilized as the basis for its handling of foreign bank subsidiaries. The extent to which it is desirable—or politic—for a policy toward transnational banking²² to be formed by the myths of domestic banking structure is a portion of the inquiry of this article.

²⁰ Klopstock, *supra* note 15, in detailing the operations of the money center foreign banks' offices, also suggests the opportunities for profit for a sophisticated money desk, untrammelled in its operations by central bank regulations applicable only to domestic institutions. To take full advantage of the opportunities for profit in an unstable international monetary situation, however, it is advisable to have a trader in each of the money capitals of the world.

²¹ For a description of this trend, see *International Banking Gets the Team Spirit*, *Fortune*, June 1972; Dicker, *International Banking Abroad*, in *Federal Reserve Bank of Chicago, The International Monetary System in Transition* 114 (1972).

²² An initial question, of course, for any lawyer advising a client with respect to a proposed transnational operation is the extent to which the "host" country in its positive law distinguishes between nationals and nonnationals. The consideration of this question leads immediately to a careful examination of any international obligation the proposed "host" may have undertaken *not* to discriminate against nationals and companies of the client's state. See,

II. A CONTOUR MAP OF UNITED STATES BANKING REGULATION FOR FOREIGN LAWYERS²³

The major features of the United States' banking regulation terrain are, in the order of discussion within this article: the limitation of entry into "depository" banking; the federal attempt to separate that business from business characterized as "investment bank-

e.g., Netherlands-United States Treaty of Friendship, Commerce, and Navigation, March 27, 1956, art. VII, [1957] 2 U.S.T. 2043, T.I.A.S. No. 3942 (effective Dec. 5, 1957), which provides:

Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activity for gain (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity

However, given the special importance to national economies of ability to control financial intermediaries, the commercial treaties typically make special provision for banking (as well as other industries considered strategic). Thus under art. VII, para. 2 of the Netherlands-United States Treaty,

Each Party reserves the right to limit the extent to which aliens may within its territories establish, acquire interest in, or carry on enterprises engaged in communications, air or water transport, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources. However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party. Moreover, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies, in conformity with the applicable laws and regulations, to perform functions necessary for essentially international operations in which they engage.

The United States treaties with France, Luxembourg and Japan have the same provision; the treaty with Belgium, while differing in language, also treats "banking involving fiduciary or depository functions" separately. However, the treaties with Italy, Norway, the United Kingdom and Denmark, while varying in the extent to which they provide for national treatment for corporations, have no special exception for banking. The effect of these treaties on the problems of regulation of foreign bank entry does not seem to have been considered to date. So far as federal regulation is concerned, subsequent legislation having the effect of giving less than "national" treatment (whatever the exact content of that term might be) to banks originating from countries having a commercial treaty with the United States without the exception for "depository" banking, while undesirable as a breach of international obligation, presumably is permissible as an exercise of congressional power to amend treaties by subsequent legislation. However, state treatment of foreign banks benefiting from a treaty that is more restrictive than the treatment that is applied to banks originating from a sister state presumably is constitutionally forbidden. One wonders how long it will be before lawyers for foreign banks whose clients either wish to enter the United States, or if, like Barclays Bank Limited, long since present, have received a setback in expansion, begin to consider the possibilities inherent in these agreements. In general, however, as the next section will demonstrate, the major impediment to foreign bank entry is not discriminatory treatment, but rather the unintended results of the interplay of federal and state legislation in "our baffling banking system."

²³ A wide-reaching, but not fully accurate, article on this topic appeared in Oct. 1972, prior to the release of the Board decisions on foreign banks under the Bank Holding Company Act that are discussed in this article. See MacKenzie & MacKenzie, Penetration of the United States Market by a Foreign Bank, 6 Int'l Law. 876 (1972).

ing" (the so-called Glass-Steagall "wall"); the notion that depository banks must not extend their physical places of business beyond state lines; the impact of antitrust regulation and conceptions on banking; and the peculiarities of regulation in a federal system where both the federal and state governments act as chartering and regulatory authorities (the so-called "dual banking system"). The relatively recent federal effort to prevent joint ownership of depository banks and other types of business deemed improper for connection to "banking" is now also a prominent feature of the regulatory landscape. It must be recognized at the outset that these features are less elements of any actual coherent scheme of legislation than they are features of the ideological terrain of banking regulation. These are the major myths of the American way of depository banking, the ideals toward which, in theory, the total scheme of regulation aspires. Now that the rapid growth of foreign bank entry has raised a fear of foreign competition,²⁴ the complaints about the competition are usually framed in terms of the myths: the foreigners may branch in more than one state; they may combine deposit taking with investment banking functions; they are not treated, in measuring the economic impact of their proposals on competition, in the same manner as a comparably sized United States bank would be treated.²⁵ In addition, state regulatory authorities presently regulating foreign bank entry see the prospect of federal regulation as a threat to the "dual banking system."²⁶ In practice, of course, the myths are just that: the last ten years have been a time of profound change for the structure of the domestic industry and the mythical walls have come tumbling down for the domestic-owned banks with the capital and initiative to break them. To the extent, however, that the tenets of regulation inform the administrative decisions of the various regulatory authorities, the drafting of legislation to deal specifically with foreign bank entry, and the interpretation and application of existing banking statutes to the attempts to enter, the myths have a real impact and the barriers to entry can only be

²⁴ See note 15 *supra*. See also Chapter 4 of the Report of the President's Council, *supra* note 6:

The growth of foreign bank activity in the United States has led to complaints that foreign banks enjoy a more favorable competitive position because they are regulated differently than U.S. commercial banks. Although there are differences in regulation, sometimes the complaints simply reflect a prejudice against competition from foreign banks *per se*

Wash. Fin. Rep. at T-3 (Feb. 18, 1974).

²⁵ See the discussion of the New York decision on the Barclays Bank proposal to acquire the Long Island Trust Company, in text at notes 119-34 *infra*.

²⁶ See, e.g., Address by Harry W. Albright, Jr., New York State Superintendent of Banks, 79th Annual Convention of the New York State Bankers Association, Lake Placid, N.Y., June 14, 1973.

understood in the context of the imperfect legislative attempts to realize the myths in concrete legislation.

A. *The General Licensing Requirement for "Depository" Banking*

It has previously been stated that, apart from the impact of the Bank Holding Company Act on incorporation of a foreign-owned subsidiary bank, there is, at present, no federal legislation governing foreign bank entry. This statement is not strictly accurate in that it does not take into account section 21(a)(2) of the Banking Act of 1933.²⁷ Since enactment of this provision as part of the post-crash overhaul of federal regulation of banking, there has been no free entry into depository banking in the United States, either for citizen or for alien. Under sanction of criminal penalties²⁸ for violation of the statute, any person or entity engaging "in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor" in the United States must receive affirmative permission from a chartering authority, either federal or state, and be subjected by such authority to examination and regulation, or if not chartered to do the business, at least be examined by the banking authorities of the jurisdiction and publish periodic reports of condition in the same manner as banking institutions incorporated in the jurisdiction.²⁹

Given the overriding command of section 21(a)(2), a foreign bank that determines to enter the United States to do a business involving the receiving of "deposits . . . repayable upon the request of the depositor" (whatever the scope of the term "deposits" may be)³⁰ must either find a welcoming jurisdiction, that is, a state with

²⁷ 12 U.S.C. § 378(a)(2) (1970).

²⁸ Section 21(b) of the Banking Act of 1933, 12 U.S.C. § 378(b) (1970), provides for a \$5,000 fine or five years imprisonment or both for both the violator of § 21(a) and for "any officer, director, employee, or agent [of the violating organization] who knowingly participates in any such violation." Section 21(a)(2) has never been interpreted and it is unknown just how far an unlicensed organization can go in holding credit balances for its customers (as bank "agencies" typically do) without coming under this prohibition. A possible reason for the lack of interpretation is the criminal penalty attached. The Board has refused to interpret § 21(a) (one of the provisions of the Banking Act of 1933 setting up the "Glass-Steagall wall" between depository and investment banking) on the grounds that the question whether a person should be prosecuted for violation of § 21 is within the jurisdiction of the Justice Department and an expression of opinion by the Board "would not afford protection from prosecution if the Department of Justice, upon consideration of the matter, should take the position that a corporation had violated the statute and should feel it necessary to prosecute for such violation." 20 Fed. Res. Bull. 41 (1934); 12 C.F.R. § 302.543 (1973).

²⁹ 12 U.S.C. § 378(a)(2) (1970). If foreign branches are to be federally licensed, clause B of § 378(a)(2), which presently refers only to entities licensed "by any State, Territory, or District to engage in such business," must be amended. None of the bills providing for federal licensing of foreign branches, discussed in text at notes 142-52 *infra*, were so drafted.

³⁰ Presumably a foreign bank could open an office which engages only in the making of

a statute affirmatively providing for the opening of branches or agencies by foreign banks and providing for their supervision and inspection in accordance with the terms of section 21(a)(2), or must obtain a charter for a domestic banking subsidiary. The desirable markets and the welcoming jurisdictions do not always coincide. The states are jealous of their chartering prerogatives and have not seen fit to authorize sister state bank entry, much less to authorize entry by "foreigners."³¹ For example, New York, always the prime market for financing of international trade, only amended its statute authorizing entry in the form of "agencies" without the power to receive deposits from the public, so as to give foreign banks the option to establish "branches" with, in effect, full service powers competitive with those of domestic banks, in 1960. Even so, a branch may only be authorized if a New York bank would be permitted to enter the country of origin of the foreign bank.³² At the time of the Zwick study, only six states authorized foreign banks to conduct business as foreign institutions (directly, rather than through a separately chartered subsidiary) and only three of those states (New York, Massachusetts and Oregon) permitted foreign banks to operate branches as well as agencies.³³ Since that time, two more states, California³⁴ and Illinois,³⁵ have amended their laws to permit foreign banks to enter by means of direct branching, but the history of the California legislation is instructive. As in New York, the impetus for the change in California law, amended in 1964 to authorize foreign branches as well as agencies, came from a United States multinational bank, Bank of America, N.A., concerned with reciprocity problems in its foreign expansion. However, the new authorization offered by the California statute was illusory; the new legislation required the foreign branch to be approved for federal insurance of its deposits,³⁶ and the Federal Deposit Insurance Act³⁷ does not provide for insurance of deposits in non-United States incorporated institutions. In 1969, however, the original per-

commercial loans without crediting the proceeds to the customer's account, or in financing foreign trade without the creation of credit balances which could be "deposits" under § 21(a)(2), but if the business is to be so restricted, it presumably is easier to open a "representative office" officially doing no business at all within the jurisdiction, all evidences of transactions being signed abroad, thus avoiding, one hopes, "presence" not only for banking law purposes but also for tax and jurisdictional purposes.

³¹ See N.Y. Banking Law § 202-d (McKinney 1971), which specifically forbids conduct of banking business by other than home state chartered or national banks. The same result is accomplished by N.J. Stat. Ann. § 17:9A-316 (1963).

³² N.Y. Banking Law § 202-a (McKinney 1971).

³³ Zwick, *supra* note 3, at 5.

³⁴ Cal. Fin. Code § 1750 (West Supp. 1968).

³⁵ Illinois Foreign Banking Office Act, Pub. Act 78-346 (1973).

³⁶ Zwick, *supra* note 3, at 4.

³⁷ 12 U.S.C. §§ 264, 1728, 1811-31 (1970).

mission which would have required *all* deposits to be insured was changed to permit foreign banking corporations so authorized by the State Banking Department to accept deposits originating from abroad without insurance.³⁸ The new Illinois legislation also limits the newly extended privilege of direct entry, but does so not by origin of deposits, but by geography and number. The office of the foreign banking corporation may conduct "a general banking business," but only one office per foreign bank may be authorized and it must be located in the area presumed by the legislation to be most suitable for its assumed international trade business, the central business district of Chicago.³⁹

Compliance with section 21(a)(2) of the Banking Act of 1933 through state licensing of branches and/or agencies, therefore, is feasible only in eight states, and in only three will the branch be the functional equivalent of a state bank or national bank charter.⁴⁰ Why, then is direct entry into the United States of interest to foreign banks at all? Since there are no laws, federal or state, that restrict foreign (non-United States) ownership of stock in separately chartered banking institutions, it would appear that entry by means of a separately chartered subsidiary would be preferable. While state bank supervisors may be highly reluctant to grant a charter to non-local organizers⁴¹ and a national bank must have all citizen directors,⁴² there is no present legislation in the United States resembling the Canadian limitations on alien interests in Canadian financial institutions.⁴³ There are, however, other considerations

³⁸ BAFT Study, *supra* note 17, at 13; Klopstock, *supra* note 15, at 142 n.4.

³⁹ Illinois Foreign Banking Office Act, Pub. Act 78-346, § 3 (1973).

⁴⁰ The Illinois legislation, of course, is equal-handed in that since Illinois does not permit its own chartered banks to have more than one place of business, a Chicago bank cannot put direct branches in the suburbs either; but the domestic bank has an *initial* choice of location. Although it is unlikely that a foreign bank would choose a retail suburban operation over a wholesale international banking operation in Illinois, it does not have the option under the new law.

⁴¹ See the reaction of the Florida Superintendent of Banks to the purchase by a Canadian bank of the shares of a national bank located in Florida, described in text at note 255 *infra*.

⁴² 12 U.S.C. § 72 (1970).

⁴³ See note 5 *supra*. Acquisitions by out-of-state groups may be limited by state bank holding company acts, and limitations are currently being placed on out-of-state acquisitions of local trust companies, see Editorial, *Am. Banker*, Feb. 3, 1972, at 4, but in no case are these restrictions aimed specifically at aliens. The only such xenophobic limitation that I know of is the requirement of the Edge Act, 12 U.S.C. §§ 611 et seq. (1970) (permitting federal incorporation of companies to engage in international or foreign banking, that a majority of the shares of an Edge Corporation be at all times held and owned by citizens of the United States or entities controlled by citizens. 12 U.S.C. § 619 (1970). The Patman bill, H.R. 11,440, 93d Cong., 1st Sess. (1973), however, if enacted in its present form, would have the extraordinary effect of precluding ownership of more than 5% of the voting stock of a national bank by foreigners, and would so hedge the operation and connections of a state-chartered bank in which foreigners own more than 5% as to amount to a prohibition on such ownership.

which may make direct entry, as opposed to entry by chartered subsidiary, more desirable. There are certain practical advantages to entry through an office of the parent bank, but the next two peculiar characteristics of the American way of banking to be discussed, the "Glass-Steagall wall" and the concept of geographic limitation, offer better clues to the popularity of direct entry. However limited the opportunities for such entry, direct entry offers foreign banks freedom from Glass-Steagall and from confinement of their places of business to one state. It is just these advantages, however, that arouse the greatest cries of "unfair competition" from the home front. The following discussion, therefore, is also concerned with whether the limitations on domestic banking are more myth than reality.

B. *The "Glass-Steagall Wall"*

One of the aims of the Banking Act of 1933, also known as the Glass-Steagall Act,⁴⁴ was to force a separation in the United States between commercial banking, which can be described as the process of intermediation of short-term funds, and the business known broadly as "investment banking," which is in theory the process of intermediation in the long-term capital markets. The history and purpose of the relevant sections of the Glass-Steagall Act are lucidly set out in the Supreme Court's decision in *Investment Company Institute v. Camp*,⁴⁵ and need not be repeated here. For continental bankers, however, the notion that anyone would attempt to make such a separation is exceedingly strange and the ramifications of the concept are not always fully understood. In most European countries the major banks also deal freely in the securities markets, not only as fiduciaries for customers, but also as principals, underwriting and dealing in securities, and the lawyer advising the foreign bank client must initially determine to what extent the client is presently engaged in, or hopes to engage in, such business in the United States. Such expectations may well determine the possible forms of banking entry into the United States.

The statutory building blocks of the "Glass-Steagall wall" consist of three sections of the Banking Act of 1933, and the three sections are *not* identical in scope. The first component of the Act is subparagraph (a)(1) of section 21⁴⁶ (subparagraph (a)(2) of which was examined above⁴⁷). Section 21(a)(1) makes it a criminal offense for any person or entity

⁴⁴ Ch. 89, 48 Stat. 162 (1933) (codified in scattered sections of 12 U.S.C. chs. 3 and 6).

⁴⁵ 401 U.S. 617 (1971).

⁴⁶ 12 U.S.C. § 378(a)(1) (1970).

⁴⁷ See text at notes 27-29 *supra*.

engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request, of the depositor⁴⁸

Thus, no entity which takes "deposits" may at the same time be in the securities business.⁴⁹ The Board has assumed the policy of this section to be such an inherent part of our ethos that it has forbidden deposit-taking entities under its jurisdiction to indulge in the wicked practice of combining banking and securities business abroad.⁵⁰ The Congress, in effect, applauded the Board's view of the portability of Glass-Steagall policy in 1962. At that time a provision was added to the Federal Reserve Act⁵¹ to authorize the Board in its supervision of the foreign activities of national banks to permit foreign branches of national banks "to exercise such further powers as may be usual in connection with the transaction of the business of banking in the places where such foreign branch shall

⁴⁸ 12 U.S.C. § 378(a)(1) (1970). There is an exception for dealing in, underwriting or issuing the kinds of securities (chiefly United States obligations and municipals) a national bank may deal in, underwrite or issue. *Id.*

⁴⁹ As noted in note 28 *supra*, the Board has refused to interpret this provision; thus it is not known what economic behavior constitutes the taking of deposits for the purposes of § 21.

⁵⁰ The Edge Act, 12 U.S.C. §§ 611 et seq. (1970), specifically gives the entities incorporated thereunder the power to "purchase and sell, with or without its indorsement or guaranty, securities, . . . but not including shares of stock in any corporation except as herein provided" 12 U.S.C. § 615 (1970). However, the Board, which is responsible for administration of the Edge Act and supervision of entities incorporated thereunder, has forbidden any Edge Corporation "engaged in banking" to engage in the business of underwriting, selling or distributing securities other than obligations of the national government or a foreign country in which it has a branch or agency or securities which may be underwritten by national banks. An Edge Corporation is "engaged in banking," as opposed to other international financial activities, when its aggregate demand deposits and acceptance liabilities exceed its capital and surplus. Regulation K, 12 C.F.R. § 211.2(d) (1973). Thus, the banking Edge may not participate in the securities business either domestically or abroad. Regulation K, 12 C.F.R. § 211.5(a) (1973). Note that § 211.5(b) forbids *any* Edge Corporation, whether or not "engaged in banking," to engage in the securities business in the United States; a nonbanking Edge may underwrite abroad.

Exactly where the line is drawn between buying and selling for its own account and "underwriting" is a question which vexes the Board in its administration of the Edge Act and the SEC in its administration of the Securities Acts, and gives corporate and banking lawyers sleepless nights. The general language of "purchase and sell," enacted in 1919, would seem to receive content from whatever is the banking business. The prohibition upon buying and selling stock would seem, from the legislative history, to have been included from fear of economic concentration. See, e.g., 58 Cong. Rec. 4956 (1919) (remarks of Sen. Gronna). The floating of bond issues was, in 1919, a perfectly proper banking function.

⁵¹ Ch. 6, 38 Stat. 251 (1913) (codified at 31 U.S.C. § 409 (1970) and in scattered sections of 12 U.S.C.).

transact business.”⁵² The statute goes on sternly to warn: “Such regulations shall not authorize . . . a foreign branch to engage or participate, directly or indirectly, in the business of underwriting, selling, or distributing securities.”⁵³ If United States banks are burdened with Glass-Steagall in their activities abroad, only too clearly foreign banks with United States arms that are taking “deposits” within the meaning of section 21⁵⁴ must refrain from participating directly in the securities business in the United States. In this respect the foreign bank must be considered to be in the same position as any other United States depository bank.

Section 21(a)(1), however, directs itself only to the situation of the combination of the two types of businesses within the confines of any *one* entity. The other two sections of the Banking Act of 1933 that make up the “Glass-Steagall wall,” sections 20⁵⁵ and 32,⁵⁶ are much less extensive in scope. Prior to 1933 the major banks had conducted their investment banking through affiliates. Section 20 of the Banking Act of 1933 put an end to that practice for banks which are members⁵⁷ of the Federal Reserve System by forbidding affiliation with organizations dealing in securities. Section 32 completed the “wall” by prohibiting interlocking directorates between member banks and such organizations (with waiver discretion granted to the Board). Since the sections apply only to member banks, theoretically any nonmember bank that is not part of a bank holding company⁵⁸ may have a sister corporation in the securities business, if such affiliation is not a violation of the state law governing the bank. In practice, of course, since the 1970 Amendments to

⁵² 12 U.S.C. § 604a (1970).

⁵³ *Id.*

⁵⁴ 12 U.S.C. § 378 (1970). Section 21(a)(1) would clearly cover a New York “branch” and a California “branch” receiving deposits from abroad. Its application to “agencies” with credit balances is unknown; certainly New York investment companies which carry credit balances participate in a sense in the securities business. See the discussion of French-American Banking Corporation, in text at notes 268-79 *infra*. One must assume that the Justice Department accepts the New York notion that such credit balances are distinguishable from “deposits.”

⁵⁵ 12 U.S.C. § 377 (1970).

⁵⁶ 12 U.S.C. § 78 (1970).

⁵⁷ All national banks are member banks; state-incorporated banks are eligible, and may opt, for membership if they meet the conditions of § 9 of the Act, 12 U.S.C. § 321 (1970).

⁵⁸ The Bank Holding Company Act, under § 3, regulates not only the acquisition of “banks” (as that term is defined by the Act) by entities or groups, 12 U.S.C. § 1842 (1970), but also prohibits the holding company from owning over 5% of the voting stock of any nonbank except those specifically excepted under § 4 of the Act, 12 U.S.C. § 1843 (1970). Section 4(c)(8) gives the Board considerable discretion in determining what types of business are “closely related to banking” and therefore permissible to a bank holding company. The Board has made clear that a securities affiliate (other than one dealing purely in securities in which a national bank may deal) is *not* a permissible affiliate under § 4 of the Act, irrespective of the status (member or nonmember) of the holding company’s bank. See 58 Fed. Res. Bull. 149 (1972); 12 C.F.R. § 225.125 (1973).

the Bank Holding Company Act extended the coverage of the Act to the holding of *one* bank,⁵⁹ almost any organizational structure utilized to tie in the bank and the securities company would constitute a "bank holding company" as presently defined in the Act and would subject the bank and its affiliates to the standards of the Act.⁶⁰ Thus, as Banco di Roma discovered to its sorrow,⁶¹ separate incorporation of a subsidiary will bring the Bank Holding Company Act into play and the Board, the administrative authority under the Act, will extend Glass-Steagall principles to the connection between the new subsidiary bank and the foreign parent's interests in the securities business in the United States.

A United States branch or agency of a foreign bank, however, is not a "bank" for the purposes of the Act. Nor is a foreign branch a member bank for the purposes of sections 20 and 32 of the Banking Act of 1933. Therefore, although a foreign branch cannot, under section 21, *itself* engage in the securities business, a foreign bank may at the same time have a United States branch or branches and a United States subsidiary⁶² in investment banking, and a few foreign banks do so operate.⁶³ The "privilege," however, results not from lack of federal regulation of foreign branches, but from the original limitations on the affiliate provisions of the "Glass-Steagall wall." Congress in 1933 did not purport to separate *all* banks from securities affiliates. The myth of Glass-Steagall has outgrown the actual statutory provisions, but so far there has not been an authority with jurisdiction to apply the myth to direct entry. More significant, however, in countering the complaints of unfair advantage, is the fact that the "privilege" exists only for those banks wishing to conduct commercial banking in a state which offers the opportunity to open a branch.

C. *The "Branching" Problem (Herein of Bank Holding Companies and Edge Corporations)*

We have seen that the ability to operate both a deposit-taking office and a securities business, that is, freedom from the Glass-Steagall principle, is one purported advantage open to foreign banks that enter the United States banking market directly. A second purported advantage open to foreign banks that enter by branching

⁵⁹ 12 U.S.C. § 1841(a)(1) (1970).

⁶⁰ However, Edge Corporations, see text at notes 91-92 *infra*, which are not "banks" for the purpose of the Act, may still, in theory at least, be incorporated by groups which are engaged in the securities business directly or through a sister subsidiary.

⁶¹ See text at notes 315-19 *infra*.

⁶² In view of the uncertain scope of § 21(a)(1), separate incorporation of the securities arm would appear advisable.

⁶³ See Klopstock, *supra* note 15, at 141.

is the ability, to the extent that the states authorize the establishment of a branch, to establish places of business in more than one state at a time. Domestic banks have no such privilege, in theory. A salient characteristic of United States regulation of banking is the theory of limitation of offices for deposit gathering to a geographical area defined by state lines (or if a state chooses, to a smaller area within which its banks are permitted to branch if branching is permitted at all). The United States has what is known as a "dual banking system;" that is, depository institutions may be chartered and supervised under either federal or state law. The federally chartered institutions are "national banks," incorporated under the National Bank Act,⁶⁴ and the larger national banks (as well as the largest state-chartered banks) participate in a national market for loans and other services. However, unlike other United States industries serving national markets, and unlike most foreign banking systems, our banks may not have physical locations coextensive with the scope of their business. To the contrary, the restriction of deposit gathering offices of any one entity or jointly-owned entities to the area defined by the boundaries of the state of location of the initial office is a tenet of United States banking regulation held as religiously as the Glass-Steagall principle. Even if a state authorizes banks chartered by it to open branch offices outside of the state,⁶⁵ most states exclude out-of-state bank entry altogether as well as limit the extent to which their banks may branch within the state.⁶⁶ The principle of limitations upon branching was so strongly held that when Congress finally enacted legislation to permit national banks to open offices in addition to their main offices,⁶⁷ these branching powers were limited to those authorized to state banks by the law of the state in which the national bank in question is located. The original legislation only authorized the addition of branches in the same city or town; subsequently, the provision was amended⁶⁸ to permit out-of-town branching, again with the state law as a measuring rod, but the language of the amendment specifically limited the new branches to locations within the bank's "home" state. Thus, under present federal law, direct branching across state lines is closed to both national banks and to state

⁶⁴ Ch. 343, 18 Stat. 123 (1874) (codified in scattered sections of 5, 12, 18, 19, 28 and 31 U.S.C.).

⁶⁵ See, e.g., N.Y. Banking Law § 105(a) (McKinney 1971), which authorizes New York banks and trust companies with capital of over \$1,000,000, with the requisite supervisory approvals, to open branch offices "in one or more places located without the state of New York, either in the United States of America or in foreign countries."

⁶⁶ See note 31 *supra*.

⁶⁷ McFadden Act, ch. 191, 44 Stat. 1224 (1927) (codified in scattered sections of 12 U.S.C.).

⁶⁸ Pub. L. No. 73-66, § 23, 48 Stat. 190 (1933).

member banks, whose branching authorizations depend upon those available to a national bank.⁶⁹ To an ingenious lawyer, however, there are a number of ways to skin a cat: if the bank can't go across state lines, why not have separately incorporated banks, each owned by the same company? Senator Douglas recognized the possibilities for evading the time-honored restrictions on transstate banking and added to the original decision by Congress in 1958 to regulate bank holding companies by means of the Bank Holding Company Act the so-called "Douglas wall": section 3(d) of the Act forbids the Board to approve any acquisition of a bank by a holding company if the bank is located outside of the state in which the operations of the holding company's banks are principally conducted, *unless* the law of the state in which the bank to be acquired is located specifically authorizes such acquisition.⁷⁰

The actual text of the "Douglas wall" forbade the Board from approving out-of-state *bank* acquisitions; it did not say anything about permissible locations of bank holding company "nonbank" interests.⁷¹ The norm of penning up banks within state lines was so pervasive, however, that in one of the earliest divestiture decisions⁷² under the newly enacted Act, First Bank Stock Corporation was denied permission to retain the stock of First Banccredit Corporation (Banccredit), a company in the business of buying and reselling consumer paper with offices in a number of locations where the holding company's subsidiary banks could not branch. In addition to other reasons for determining that the business of Banccredit was not a "proper incident" to the business of banking or managing or controlling banks (the test under the 1958 Act for permissible non-bank business of bank holding companies), the hearing examiner found that to authorize retention of a company with branch offices where the subsidiary banks could not branch "would be for the Board to sanction a device enabling a bank holding company to evade restrictions imposed upon it and upon its banking subsidiaries in contravention of the statutory purposes"⁷³ The Board agreed with the hearing examiner's finding, holding that Banccredit's

⁶⁹ 12 U.S.C. § 321 (1970).

⁷⁰ 12 U.S.C. § 1842(d) (1970). No such state laws presently exist, although enactment of such authorizations on a reciprocal basis is presently a project of the New York State Banking Department. We shall see subsequently, see text at notes 230-45 *infra*, how the Board has had to struggle with this provision in its application to foreign bank subsidiaries.

⁷¹ Recall that the Board controls acquisitions of "banks" under § 3 of the Act, 12 U.S.C. § 1842 (1970); § 4 of the Act, 12 U.S.C. § 1843 (1970), sets out (with considerable discretion to the Board) what "nonbank" business a bank holding company may retain or enter. See text at notes 135-41 *infra*.

⁷² *In re* The Requests of First Bank Stock Corporation for Determinations under Section 4(c)(6) of the Bank Holding Company Act of 1956, 45 Fed. Res. Bull. 917 (1959).

⁷³ *Id.* at 924.

activities failed to meet the "proper incident and purposes of the Act" requirements of the Bank Holding Company Act, as it then existed, on the grounds, *inter alia*, that Bancredit's activities "represent a type of corporate structure, readily available to a holding company and relatively inaccessible to nonholding company banks, which is likely to have effects of a kind which the Bank Holding Company Act was intended to prevent."⁷⁴ It may be speculated that the *Bancredit* decision was a determinative factor in the lack of growth of multibank bank holding companies until the late 1960's.⁷⁵ The holding company corporate structure presumably lost a good deal of its interest to innovative bankers when it could not be used to avoid the marketing straitjacket of state lines.

Had the Board—and subsequently Congress—adhered to the principle enunciated in the *Bancredit* decision—that nondepository banking business must be restricted to permissible locations for deposit gathering—the current complaints about the unfair competitive advantage of foreign banks in being able to avoid the application of both the Bank Holding Company Act and restrictions on multistate banking by direct entry through branches in different states might have greater cogency. But the *Bancredit* decision and the initial Board resistance to exempting so-called "loan production" offices from the branching restrictions⁷⁶ represented the high water

⁷⁴ *Id.* at 928.

⁷⁵ Until the 1970 Amendments, however, companies owning only one bank were not subject to regulation under the Act. Why, then, did the banks with resources to form a holding company and operate multistate nonbank subsidiaries not do so earlier than 1968, the date of conversion of First National City Bank of New York into a one-bank holding company? One reason may have been that the initial impulse for the extension of business across state lines was satisfied, for the moment, for the major national banks by the Comptroller's ruling on loan production offices, see note 76 *infra*. More important, perhaps, was the fact that until the 1966 Amendments to the Bank Holding Company Act, Pub. L. No. 89-485, 80 Stat. 236 (1966), the Federal Reserve Act and the National Bank Act contained a number of provisions concerning the relationship between a member bank and its affiliates which had been enacted as part of the Banking Act of 1933. Included in the provisions were § 19 of the Banking Act of 1933, 12 U.S.C. § 61 (1970), requiring, *inter alia*, each "holding company affiliate" (a term which included companies owning *one* member bank as well as multibank holding companies owning a member bank) to hold readily marketable assets *other* than bank stock and to reinvest a prescribed amount of net earnings in such assets until they equaled 25% of the par value of the bank stock controlled by the affiliate. From the point of view of formation expense (possible incurring of realized gain on transfer of assets, stock issue taxes, etc.), to say nothing of the point of view of stockholders whose holding company dividends might be restricted by the reinvestment provision, it is quite one thing to organize a holding company whose sole asset is the bank stock it is organized to hold and quite another to inject into the top shell a sufficient amount of marketable assets to comply with the provision. Fortunately for expansion-minded banks, the 1966 Bank Holding Company Act Amendments, apparently simply as a technical legislative matter without any realization of the real effects, repealed this provision, and the rush to one-bank holding company structure followed after First National City Bank's lawyers had seen the new light.

⁷⁶ The Comptroller in 1966 had issued a new ruling interpreting the National Bank Act so as to permit national banks to establish "loan production" offices at locations at which,

mark of adherence to the myth of local banking. Economic pressures for change in banking structure joined hands with creative lawyering and the business was expanded under another label. Just as the Comptroller of the Currency had discovered that an out-of-state office could be a "loan production" office and not a branch, so creative lawyers discovered that there was a provision in the Bank Holding Company Act under which a holding company *could* establish out-of-state offices. Section 4(c)(1)(c) (now section 4(a)(2)(A)) permitted bank holding companies to hold the shares of corporations "furnishing services to or performing services for such bank holding company or its banking subsidiaries."⁷⁷ The Board was persuaded to rule in 1967 that a bank holding company could acquire under this provision the stock of a mortgage company that "would solicit mortgage loans on behalf of a bank in the holding company system, assemble credit information, make property inspections and appraisals and secure title information."⁷⁸ This was only the crack in the wall; the company was not itself to make the loans or even to service them on a fee basis, but significantly, the ruling did not mention any particular location for the offices of the mortgage company.⁷⁹ Thus, so long as a holding company could arrange for a subsidiary to provide various financial services, without performing "as principal any banking activities . . . in other words, if the [subsidiary] is to act merely as an adjunct to a bank for the purpose of facilitating the bank's operations,"⁸⁰ the offices of the subsidiary could be located in another state.⁸¹

The 1970 Amendments to the Act gave the *coup de grâce* to the old religion. Curiously enough, the blow was delivered in almost

under 12 U.S.C. § 36 (1970), a branch could not be opened. The Board responded by ruling that so far as its power to interpret § 36 for state member banks was concerned, it considered an office soliciting borrowers, negotiating terms and processing loans a "branch." 53 Fed. Res. Bull. 1334 (1967).

⁷⁷ 12 U.S.C. § 1843(a)(2)(A) (1970).

⁷⁸ 53 Fed. Res. Bull. 1911 (1967).

⁷⁹ See *id.* at 1911-12.

⁸⁰ *Id.*

⁸¹ This mortgage company subsidiary decision was subsequently to force the Board to do some categorical rethinking about its ruling, see note 76 *supra*, on loan production offices. With this decision, the Board was in the position of permitting bank holding company banks to have sister corporations performing virtually the same activities under the guise of "service" corporations that the Board had forbidden nonholding company banks to perform at non-branch locations through "loan production" offices which typically are structured never to act as "principal." The competitive edge to a holding company structure, the result the Board stressed as undesirable in the *Bancredit* decision, was apparent and the Board reversed itself—not by moving backward, but by finally recognizing the irresistible thrust of change away from isolated local banking. In effect, the Board accepted the Comptroller's viewpoint on "loan production" offices and now declared that, since "the purposes of the branch banking laws and the servicing exemption are related . . . an office that only performs servicing functions should not be considered a branch." 54 Fed. Res. Bull. 681 (1968); 12 C.F.R. § 250.141 (1973).

total silence. While intense debate raged over whether there should be a statutory "laundry" list of activities prohibited to bank holding companies and over what should be the content of a public interest standard if the Board were to be given discretion in determining permissible types of nonbank subsidiaries,⁸² no member of Congress noticed (publicly at least), and presumably the companies concerned were careful not to point out, that the requirements of the new section 4 standard for judging the retention or acquisition of non-bank subsidiaries (that decreased competition should be weighed as an adverse effect and that there could be differentiation between activities commenced *de novo* and activities commenced by acquisition of a going concern)⁸³ would favor the establishment of non-banking subsidiaries in markets in which the banks in the holding company were *not* present. Such an interpretation would in one stroke wipe out forever *Bancredit's* ghost.

The Board did not hesitate in so reading the new statute. The announcement of the new regulations under the revised section hinted broadly: "The regulatory amendments do not limit the location of a permissible activity to any State or other geographical area but limitations may be imposed by order in individual cases."⁸⁴ The companies did not fail to take the hint and acquisitions by the major companies of nonbank subsidiaries in areas far from the state of location of the subsidiary banks were quickly arranged. In a scant three years since the enactment of the 1970 Amendments, business that is "so closely related to banking or managing or controlling banks as to be a proper incident thereto"⁸⁵ is business that is nationwide in scope. Whatever may be the concerns of counsel to a bank holding company in advising on a prospective out-of-state acquisition, it is no longer necessary to worry whether the proposed subsidiary can be pushed and pulled into the skin of a "services" corporation. Anything (anything, that is, except the activities which would constitute the subsidiary a "bank" subject to acquisition under section 3 of the Act, *i.e.*, accepting deposits that the depositor has a legal right to withdraw on demand and making commercial loans⁸⁶), roughly,⁸⁷ that the subsidiary banks can do can be done

⁸² Blaine, Registered Bank Holding Companies and the One-Bank Holding Company, 26 Bus. Law. 9, 12 (1970).

⁸³ 12 U.S.C. § 1843(c)(8) (1970).

⁸⁴ Federal Reserve Bank of New York, Circular No. 6739, May 28, 1971.

⁸⁵ 12 U.S.C. § 1843(c)(8) (1970).

⁸⁶ Bank Holding Company Act § 2(c), 12 U.S.C. § 1841(c) (1970). See also the Board's proposed amendment to Regulation Y, 12 C.F.R. § 225.4(a)(4) (1973), concerning deposit taking by trust companies acquired under § 4 as nonbank subsidiaries, Fed. Res. Press Release, July 3, 1973, discussed in note 248 *infra*.

⁸⁷ The qualification "roughly" is added because some state banks may be authorized by state law to perform activities which are not, in the Board's view, activities permissible to

out-of-state by the nonbank subsidiaries. It can, of course, be argued that the activities contained within the parentheses above are the heart of the matter: that it is access to funds in the local market for deposits that matters. When it is a question of competition between local banks and out-of-state bank holding company subsidiaries, that argument has great force. But to complain that foreign banks have access to local deposits in more than one state is to complain in the face of what is known of the economic facts: even in the five states that permit some form of local deposit taking, a branch of a foreign bank cannot offer federal deposit insurance and appears to be competitive only for deposits of particular ethnic groups, or deposits of customers for international services, or deposits related to transactions in the international money markets.⁸⁸ Thus the "privilege" seems to be one of doing business in more than one state at a time, and this privilege domestic banks now have through a holding company structure.

Indeed, the major domestic banks not only do multistate business through a holding company structure, but they have found a way to participate in international banking business (including deposit receipt) on a multistate basis, through utilization of Edge Corporations. At the same time that the 1970 Amendments were creating a new world of what the Board calls "multi-state operations"⁸⁹ for bank holding companies and their banks, the major domestic banks with active international departments⁹⁰ were discovering what First National Bank of Boston and Bank of America had known and utilized for many years—an esoteric but effective route to an out-of-state office. An understanding of the particulars of this route is necessary both to evaluation of complaints about the "advantages" of foreign banks and to comprehension of the Board's choice of standards in regulation of transnational banking under the Act. As noted previously,⁹¹ the Edge Act⁹²

bank holding company subsidiaries under § 4(c)(8) of the Act. For example, the leasing powers of New York State banks under N.Y. Banking Law § 96(12) (McKinney 1971), and the leasing powers of a leasing subsidiary under Regulation Y, 12 C.F.R. § 225.4(a)(6) (1973), are not coextensive.

⁸⁸ Joint Economic Comm., 89th Cong., 2d Sess., *Foreign Banking in the United States* 11-12 (Economic Policies and Practices, Paper No. 9) (Comm. Print 1966).

⁸⁹ Fed. Res. Press Release, July 3, 1973, on proposed amendment to Regulation Y, 12 C.F.R. § 225.4(a)(4) (1973), concerning deposit taking by subsidiary trust companies. See note 248 *infra*.

⁹⁰ Wash. Fin. Rep. at X-2 (Aug. 20, 1973) shows as of that date four new Edge Corporation formation applications to the Board: Continental Illinois National Bank (head office in Chicago), in Houston; Bankers Trust of New York, in Chicago; Manufacturers Hanover Trust Company of New York, in Los Angeles; and Morgan Guaranty of New York, in Houston.

⁹¹ See note 43 *supra*.

⁹² 12 U.S.C. §§ 611 et seq. (1970).

permits federal incorporation of companies to do an international banking business. The Act specifically provides that only such business "as, in the judgment of the Board of Governors of the Federal Reserve System, [is] incidental to its international or foreign business" may be carried on by these Corporations in the United States,⁹³ but no restriction is placed on the location of the home office. National banks and many state banks are authorized to invest in the stock of these Corporations, without restriction by location.⁹⁴ Therefore, a bank may own an Edge Corporation with its home office in a location where the bank itself could not branch. In 1918 the Board approved the entry of First National Bank of Boston into the New York market by establishment of an Edge Corporation,⁹⁵ and for many years the giant Californian, Bank of America, has been present in New York through its Edge subsidiary. Unlike most non-bank holding company subsidiaries, these Edge companies can and do take deposits and, therefore, may compete with local banks for a limited segment of the market. The scope of presently permissible domestic business for Edge Corporations is spelled out in the Board's Regulation K.⁹⁶ This business includes the right to accept time and demand deposits from foreigners and deposits otherwise linked to the Corporation's international and foreign business, including proceeds of extensions of credit by the Edge Corporation. Despite very careful delineation by Regulation K of the boundaries of permissible domestic business so as to insure that these federal corporations do not compete in the domestic markets with local banks,⁹⁷ the scope allowed to Edge Corporations for service to customers involved in international trade and business is considerable. Governor Brimmer of the Board has noted that the applications by banks to open Edge offices outside of New York "engendered protests in almost every case from one or more local bankers who were apprehensive about the effects of increased competition which the newcomers would bring."⁹⁸ Nevertheless,

⁹³ 12 U.S.C. § 616 (1970).

⁹⁴ 12 U.S.C. § 618 (1970).

⁹⁵ Brimmer, *American International Banking Trends and Prospects* 38 (paper presented by Andrew F. Brimmer to the 51st Annual Meeting of the Banker's Association for Foreign Trade, Boca Raton, Fla., April 2, 1973).

⁹⁶ 12 C.F.R. § 211.7 (1973).

⁹⁷ The competition for domestic deposits is made more equal by the requirement of Regulation K, 12 C.F.R. § 211.7(c) (1973), that these United States-received deposits are subject to the reserve requirements imposed against deposits in member banks. Moreover, competition against local banks is limited in that, under the terms of 12 C.F.R. § 211.7(c)(2) (1973), the Edge Corporation cannot hold, for example, the payroll account of an export corporation.

⁹⁸ Brimmer, *supra* note 95, at 40. The Board has not been unaware of the fact that such out-of-state Edge offices are a transgression of a cherished myth. Brimmer goes on to say that "[i]n dealing with these applications—and without formally enunciating it—the Board seems

presumably in the interest of furtherance of growth of international banking, the Board has permitted this form of out-of-state office.

In evaluating the complaints that foreign banks may branch into more than one state at once, complaints that, given the history of domestic banking structure just outlined, seem to be predicated on what is now only a paper tiger of geographical restriction, it may also be noted as a final point that the Edge route of multistate operations is *not* open to foreign banks. In what seems to have been a pure exercise in xenophobia,⁹⁹ the Edge Act was drafted (and/or amended on the House floor) to provide that all of the directors of an Edge Corporation must be citizens of the United States¹⁰⁰ and that a majority of the shares must at all times be held and owned by citizens of the United States or by corporations "the controlling interest in which is owned by citizens of the United States."¹⁰¹ It would seem that the "privilege" of multistate depository banking is given in different ways to different people, for historical and not instrumental reasons.

D. Bank Entry and Antitrust Standards

No contour map of United States regulation of banking would be complete without mention of the prominent part that American antitrust concepts and standards have come to play, since 1960, in what was originally a protected and deliberately anticompetitive economic environment. The basic concepts of antitrust regulation are no longer foreign to any banker or lawyer originating from a country adhering to the Treaty of Rome with its Articles 85 and 86.¹⁰² The process of the injection of antitrust standards into the regulation of the banking industry in the United States has, however, left a number of presently unresolved issues, issues stemming not only from the interplay of the antitrust laws and the special bank merger statutes, but also from the natural tension between a complex of laws whose *ultimum bonum* (in theory at least) is the

to have evolved a policy under which a bank has been able to open at least one out-of-state international banking office in Miami . . .," another along the southern border, one along the northern boundary and one or two on the West Coast. *Id.* In this ambiguous situation, Brimmer warns, "it is of crucial importance that the banks abide by the spirit as well as the letter of the regulations restricting their activities to international banking." *Id.* One suspects, however, that however willing the spirit, the executive flesh is weak, and that the new wave must be considered as one more phenomenon of the nationalization (in quite another sense) of banking.

⁹⁹ See 58 Cong. Rec. 4963-66 (1919), particularly at 4965 (remarks of Sen. Gronna): "We ought to make it definite and certain that this is an American institution owned and operated by American citizens and controlled by American citizens."

¹⁰⁰ 12 U.S.C. § 614 (1970).

¹⁰¹ 12 U.S.C. § 619 (1970).

¹⁰² Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3.

maximum competition leading, presumably, to the demise of the unfit, and an industry into which entry is limited by licensing so as to restrict the number of competitors and to prevent failures.¹⁰³ The history of banking and antitrust regulation has been fully recounted elsewhere¹⁰⁴ and need not be repeated here. It is sufficient simply to note that among the unresolved issues are such questions as the application of the doctrine of potential competition¹⁰⁵ to proposed combinations in banking, and the extent to which the two major fora in which issues of banking and competition are presently raised, the Board in decisions under sections 3 and 4 of the Bank Holding Company Act,¹⁰⁶ and the courts in response to action by the Department of Justice, will develop a cohesive set of principles or will apply conflicting standards, leaving potential entrants to divination, rather than rational prediction, of the possibility of challenge of the transaction on competitive grounds.

In the case of foreign bank entry, there has been little opportunity to date for the working out of these principles in their relationship to transnational banking,¹⁰⁷ since entry has in most cases been

¹⁰³ Note the title of the Comptroller's Address cited in Kintner & Hansen, A Review of the Law of Bank Mergers, 14 B.C. Ind. & Com. L. Rev. 213, 250 n.189 (1972): "Financial Competition in a Regulated Environment." The tension is also well illustrated in Mr. Hansen's recounting of the testimony in the trial in *United States v. First National Bancorporation Inc.*, in Hansen, Greeley Bank: Some Speculations, 90 Banking L.J. 578 (1973). Clearly the doctrine of "potential competition" is skewed when the theoretical entry depends on governmental licensing. The gravamen of the Government's case against the acquisition of First National Bank of Greeley by Bancorporation was that the acquisition would eliminate Bancorporation as a *potential* entrant (presumably by formation of a de novo bank or acquisition of a smaller bank than Greeley); the Comptroller's Regional Administrator of National Banks testified that the approval of a new national charter in Greeley for the next five years was "unlikely." *Id.* at 587.

¹⁰⁴ See Kintner & Hansen, *supra* note 103.

¹⁰⁵ This doctrine, described in Kintner & Hansen, *supra* note 103, at 252-55, may be described as the analog in antitrust law to the notion of a "chilling effect" in constitutional law. If the proposed combination goes through, will the resulting business be so fearsome as to keep other potential entrants away?

¹⁰⁶ The Bank Holding Company Act requires the Board to judge, in the case of bank acquisitions under § 3, whether any "anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served," 12 U.S.C. § 1842(c)(2) (1970); in the case of nonbank acquisitions under § 4(c)(8), whether "undue concentration of resources, decreased or unfair competition" are outweighed by public benefits, 12 U.S.C. § 1843(c)(8) (1970). The jurisprudence of the Board in this area is only emerging. To my knowledge, a thorough analysis of the Board's decisions under the statutory standards of the 1970 Amendments has not yet appeared.

¹⁰⁷ Nothing, of course, in either the antitrust statutes or the Bank Holding Company Act *mandates* differential treatment of a transaction involving nonnationals insofar as the question of the effect on competition is concerned. Indeed, one decision of the Board, concerning the application under § 3(a) of the Act of an English company to acquire, through a tender offer, 51% of a smaller national bank in New York, suggests that the foreignness of the applicant under § 3 is irrelevant. Order of the Board in Cedar Holdings Limited, Bankers, Fed. Res. Press Release, Dec. 10, 1973. The Board does not discuss in the Order the fact that this was a

by establishment of a new branch or by formation of a new subsidiary bank, a situation in which, as the Board has noted, "the addition of [the new bank] will provide increased banking facilities and competition."¹⁰⁸ However, in three recent instances (the acquisition of Inter National Bank, Miami, Florida, by the Royal Trust Company, Montreal, Canada; the proposed acquisition of Long Island Trust Company, New York by Barclays Bank Limited; and the proposed acquisition of First Western Bank and Trust Company, Los Angeles, California by Lloyds Bank Limited), the method of entry has been by acquisition (or proposed acquisition) of control of an existing bank. In one case the acquisition involved one bank too small to raise antitrust questions. Although the Canadian bank that acquired Inter National Bank was, as of December 31, 1971, the largest trust company in Canada, Inter National Bank itself was, with only forty-three million dollars in deposits—1.26 percent of the total amount of deposits in commercial banks in Florida—too much of a minnow to inspire discussion of the effect of the transaction on the competitive pond. On the other hand, however, the Barclays' and Lloyds' proposals can be seen as raising a number of questions concerning the application of doctrines of competition in banking to foreign bank entry, particularly questions concerning the doctrine of potential competition.¹⁰⁹ The Barclays-Long Island Trust Company proposal has run aground on the dual banking system (although, as will be seen, the shoal was camouflaged with tortured antitrust doctrine) and the Board will not give itself the opportunity to consider the matter. While Barclays' attempted acquisition has been defeated in New York, Lloyds has successfully acquired an existing California bank. The Board's decision¹¹⁰ on the Lloyds-First Western Bank proposal suggests that, for the moment at least, if the proposal is not attacked on competitive grounds by the state authorities, as was Barclays' plan, the foreign entrant, whatever its size and the size of its acquisition, need not overly concern itself with competitive factors. Lloyds, with total consoli-

transnational acquisition except to note that since "Applicant does no business in the United States, it is clear that consummation of the proposal would eliminate no existing or likely potential competition between Applicant or Bank." *Id.* at 2.

¹⁰⁸ *Banque Nationale de Paris*, Paris, France, 58 Fed. Res. Bull. 371 (1972).

¹⁰⁹ While Barclays has business in New York through two subsidiaries, see text at notes 238-39 *infra*, that business does not compete, except on a *de minimis* basis, with the Long Island Trust Company. Lloyds does not have an operation in California at all. Thus both proposals represent what is classified in antitrust lore as a market extension acquisition. See Kintner & Hansen, *supra* note 103, at 251. The issues raised by the Barclays proposal are discussed at length in the next section.

¹¹⁰ Statement of the Board on Lloyds Bank Limited and Lloyds First Western Corporation, Dec. 10, 1973, 60 Fed. Res. Bull. 125 (1974) [hereinafter cited as Statement of the Board].

dated assets on December 31, 1972 of over thirteen billion dollars, is the fourth largest commercial bank in Great Britain. The New York branch of its wholly-owned subsidiary had, as of December 31, 1972, approximately 362 million dollars in deposits.¹¹¹ Furthermore, with ninety-five offices and 1.4 billion dollars in assets, First Western is more than a "toehold" in California. The Board did take note of the fact that "Lloyds Bank could enter any of the local banking markets in California served by Bank either *de novo* or through the acquisition of a smaller bank," but it concluded (without reciting its data for the conclusion) cheerfully:

[T]he acquisition of Bank [First Western] by Lloyds Bank would not have an adverse effect on potential competition because consummation of the proposal would not give Lloyds Bank a dominant share of the banking resources in any market served by Bank, nor would it appear to foreclose the entry of other banking organizations into any such markets.¹¹²

The "if" concerning state challenges on competitive grounds, however, is a large one. Barclays had impressively briefed its case on competitive factors to the Board¹¹³ in its Bank Holding Company Act application for federal permission to acquire the Long Island Trust Company; it failed miserably in persuading the New York authority to permit the acquisition. Had the Board seen itself as the appropriate authority to make the ultimate decision on whether or not the English bank should increase its depth of entry into the New York metropolitan market, one may assume from the *Lloyds* decision that the Board would have approved the acquisition. The Board, however, did not give itself the opportunity to make the decision¹¹⁴ and its deference to New York and New York's appreciation of the competitive factors, no doubt puzzling to foreign observers, must be understood as a consequence of the last special characteristic of American regulation of banking: the so-called "dual banking system."

¹¹¹ Id. at 2.

¹¹² Id. at 3.

¹¹³ Exhibit G., Application to the Board of Governors of the Federal Reserve System of Barclays Bank Limited and Barclays Bank International Limited under § 3(a)(3) of the Bank Holding Company Act [hereinafter cited as Application to the Board].

¹¹⁴ The Board has issued a ruling, 37 Fed. Reg. 5084 (1972), dated Feb. 25, 1972, that in the case of applications for the acquisition of voting shares of a bank by a bank holding company "in circumstances where approval by the appropriate State banking authority is required but has been denied, such disapproval precludes consummation of the proposed acquisition." Thus, the Board will regard the application to it as moot, and will dismiss it without prejudice. Presumably this is what was done in the case of Barclays' application to the Board.

E. *The Dual Banking System*

The final myth of banking regulation in the United States is the importance of preserving the system under which both the states and the federal government are chartering authorities for banks and where both have examination and supervisory functions.¹¹⁵ One rationale for limitation of the branching powers of national banks to those permitted to state banks in the state where the national bank in question is located¹¹⁶ is that to permit broader powers to national banks would cause the state banks to convert to national charters and so, effectively, deprive the states of their chartering rights. Thus state regulation of banking is given great deference by Congress, and derivatively, by the Board, following the injunction of the Act that its enactment "shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."¹¹⁷ The Board seems to have assumed, as indicated by its dismissing applications under the Act where state supervisory approval is denied,¹¹⁸ that this command

¹¹⁵ It cannot, however, be stressed too often to a foreign client that the two systems are *not* dichotomous, and that the obtaining of a state charter does not mean an absence of overlapping federal supervision. If a state-incorporated bank is not a "subsidiary" of a "bank holding company" as those terms are defined in the Bank Holding Company Act, if it has not chosen to become a member bank of the Federal Reserve System or to have its deposits federally insured, it will in fact be only state-supervised, although, of course, it may still bump into federal regulation of some of its activities. Prior to the 1970 Amendments, it was possible for a foreign bank entering through creation of a state bank subsidiary (assuming the state chartering authority would grant a charter to foreigners) to fulfill these qualifications. Now that the foreign bank is a "company" as defined in the Bank Holding Company Act § 2(b), 12 U.S.C. § 1841(b) (1970), the acquisition of a controlling (again as therein defined) interest in the locally incorporated bank is subject to the supervision of the Board, the foreign bank by virtue of becoming a "bank holding company" is subject to the Board's supervision under the Act, and, finally, the subsidiary bank itself becomes subject to the supervision of the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act because the 1970 Amendments amended the Bank Holding Company Act to require that every holding company subsidiary bank "become and remain an insured bank as such term is defined in Section 3(b) of the Federal Deposit Insurance Act." 12 U.S.C. § 1842 (1970). Thus, the single act of entry by obtaining a state banking charter brings two separate federal regulatory agencies into the picture.

¹¹⁶ See text at note 67 *supra*.

¹¹⁷ 12 U.S.C. § 1846 (1970). The possibilities for interplay between this provision and the command of the treaties of commerce that state legislation not violate their promises are evident. I would assume that the way out of this dilemma is to assume that whatever jurisdiction the states may have to regulate the acquisition of banks within their territory, that jurisdiction may not treat a foreign (non-United States) acquisition differently than a sister state acquisition. The question, however, of just how far the states can go in excluding out-of-state acquisition of interests in certain types of companies (for example, trust companies) before coming into conflict with the commerce clause of the United States Constitution is surfacing today with bank holding company nonbank expansion.

¹¹⁸ See note 114 *supra*.

includes not only state legislation, but also the decisions of state administrators.¹¹⁹ Thus the foreign bank entrant is subjected, in our dual banking system, not only to exclusive jurisdiction of the states over direct entry and over the initial grant of a state charter for entry by formation of a new subsidiary, but also to state approbation of the acquisition of stock of an existing bank, and even, presumably, if the state legislation includes, as does New York's, asserted jurisdiction over acquisition of stock of a national bank located within the state, to state approbation of acquisition of a national bank charter.

The practical result of the system for a foreign bank entrant is well illustrated by the history of Barclays' attempt to purchase the stock of the Long Island Trust Company, a history which also illustrates the dangers of granting, in effect, exclusive appreciation of competitive and public interest factors to a state authority with a particular constituency. At the end of 1972 Barclays Bank Limited of London, the largest British bank with total assets of approximately twenty-four billion dollars, was operating in New York through two foreign branch offices of its subsidiary, Barclays Bank International Limited (BBIL), and a separately incorporated New York bank, Barclays Bank of New York (BBNY). These offices and BBNY together represented approximately 289 million dollars of assets in New York. BBNY, under the New York law then governing commercial bank branching, could not branch out into rapidly growing Suffolk County at the end of Long Island and could only apply for a limited number of new branches each year in Nassau County, considered by New York City banks as part of the greater metropolitan area. The BBIL branches and BBNY were carrying on a largely internationally linked business¹²⁰ and Barclays' man-

¹¹⁹ It is not at all clear from the legislative history of § 7 of the Act, 12 U.S.C. § 1846 (1970), that Congress meant to include within the protection of this section discretionary decisions of state supervisory authorities as well as positive state legislation. The House bill contained a provision granting to the bank supervisory authorities (state authority or the Comptroller of the Currency, as the case might be) the power to veto any acquisition, regardless of the opinion of the Federal Reserve Board. The Senate bill, S. 2577, 84th Cong., 2d Sess. (1956), rejected this view, substituting the present provision of the Act (§ 3(b)) that the Board obtain the views and recommendations of the supervisory authority, hold a hearing if the supervisory authority disapproves, and after the hearing, approve or disapprove the acquisition by formal order. See 102 Cong. Rec. 6751 (1956) (remarks of Sen. Robertson). As stated by Sen. Robertson: "This procedure should afford an opportunity for developing the true merits of each case and also assures adequate recourse to court review for the aggrieved party." *Id.* It is hard to reconcile the procedure mandated under § 3(b) of the Act and the ruling of the Board, *supra* note 114, that disapproval by the state authority precludes consummation of the proposed acquisition.

¹²⁰ The Application to the Board, *supra* note 113, at 27, notes:

The ethnic and international associations, while perhaps not as numerous on the

agement determined to enter the potentially profitable local retail banking market by acquisition of an existing bank with a widespread set of retail branches. The proposal was to have BBIL acquire for cash one hundred percent of the voting shares of the Long Island Trust Company (LIT) with total assets of 508 million dollars and thirty-two offices throughout Nassau and Suffolk counties.¹²¹ The acquisition would require the approval not only of the Board under section 3(a)(3) of the Act,¹²² but also of the New York State Banking Board under section 142 of Article III-A of the New York Banking Law,¹²³ the New York Bank Holding Company Act. The New York provisions well reflect the schizophrenia¹²⁴ of competitive standards in banking. Section 142 requires the State Banking Board to take into consideration in determining whether or not to approve an application under the section:

(i) the declaration of policy contained in section ten of the chapter, (ii) whether the effect of such action shall be either to result in the formation of a bank holding company or to expand the size or extent of the resulting or acquiring bank holding company beyond limits consistent with adequate or sound banking and the preservation thereof, or result in a concentration of assets beyond limits consistent with effective competition, (iii) whether such formation, merger, consolidation or acquisition may result in such a lessening of competition as to be injurious to the public or tend toward monopoly, and (iv) primarily, the public interest and the needs and convenience thereof.¹²⁵

However, the "policy" stated in section 10 was enacted in 1935 and reflects the anticompetitive spirit of the period: section 10 directs the Banking Department to regulate banking organizations so as "to eliminate unsound and destructive competition among such banking organizations and thus to maintain public confidence in such business and protect the public interest and the interests of

consumer level as in the case of the New York operations of the Puerto Rican banks, do play a role in the composition of BBNY's accounts. In fact, over 43% of its New York State commercial and industrial accounts are U.S. affiliates of traditional customers of BBIL elsewhere in the world.

¹²¹ Recommendation of the Superintendent of Banking to the Banking Board with respect to the Application of Barclays Bank Limited and Barclays Bank International Limited pursuant to Section 142 of the Banking Law of the State of New York 6 [hereinafter cited as Recommendation].

¹²² 12 U.S.C. § 1842(a)(3) (1970).

¹²³ N.Y. Banking Law § 142 (McKinney 1971).

¹²⁴ See text at note 103 *supra*.

¹²⁵ N.Y. Banking Law § 142(1) (McKinney 1971).

depositors, creditors, shareholders and stockholders.”¹²⁶ Thus New York’s Bank Holding Company Act simultaneously directs the Banking Board to ensure that the proposed action will neither cause “unsound competition” nor result in a “lessening of competition so as to be injurious to the interest of the public.” Presumably, under these standards, the ideal acquisition would be the competitively neutral one.

Barclays argued to the Board, and presumably also to the New York Banking Board, that its proposed acquisition of LIT could eliminate neither existing competition (there being none between LIT’s retail business and Barclays’ internationally oriented New York outlets) nor potential competition. In short, Barclays presented itself as the foreign underdog, able to stir things up around the New York City and Long Island banking markets only by acquisition of a bank with a branch network like that of LIT.¹²⁷ Certainly the proposition represented a conglomerate merger in the sense that LIT and BBNY are presently not only in separate geographic markets, but are also in what could be found to be separate lines of commerce—international banking and Long Island retail consumer banking. Analyzed in this way, the proposal would seem to fit the apparent requirements of section 142 of the New York Bank Holding Act of a competitively neutral acquisition. If the owners of LIT wish to cash in on suburban growth by selling out, better Barclays as the buyer than any of the domestic giants with the resources to pay forty-seven dollars a share (the offer to LIT contained a considerable premium). This would seem to have been the Board’s conclusion with respect to Lloyds’ acquisition of First Western in California.¹²⁸

The Superintendent of Banks of New York, however, took a novel tack, one for which the statutory authority in the New York Bank Holding Company Act is not exactly visible: the application was to be judged not on antitrust grounds,¹²⁹ but from the point of

¹²⁶ N.Y. Banking Law § 10 (McKinney 1971).

¹²⁷ One may note that this is exactly the argument that the Board bought for the Lloyds-First Western acquisition: “Moreover, it appears that consummation of the proposal may increase competition, as application with Lloyds Bank should make Bank a stronger and more vigorous competitor of other California banks in local banking markets throughout the State.” Statement of the Board, *supra* note 110, at 3.

¹²⁸ See text at notes 110-12 *supra*.

¹²⁹ This statement is somewhat unfair to the Superintendent: the Recommendation, *supra* note 121, at 16ff., does indeed discuss “Competitive Aspects,” but from a perspective that is hardly traditional antitrust analysis. The analysis admits that Barclays’ entry into the Long Island retail market by the acquisition of the Long Island Trust Company “would not eliminate any significant existing competition between LIT and the Barclays group nor would it materially increase the concentration of bank deposits or offices in any relevant market in this State.” *Id.* at 16. Moreover, if Barclays for the purpose of the analysis is regarded as a “\$289 million [the total of Barclays’ assets in New York] bank, . . . the potential competition

view of "reciprocity." After stressing the importance of that concept to New York State,¹³⁰ the Superintendent proceeded to redefine the term. Some people think, the Superintendent noted, that reciprocity means that you treat a foreign bank the way its home country treats your banks. "I do not accept this definition of reciprocity."¹³¹ Rather, "reciprocity" means "for purposes of expansion by merger or acquisition, foreign banks in New York should be treated in a 'non-discriminatory' manner, that is, the same as other banks headquartered in New York."¹³² Since a New York bank of Barclays' size (that is, its total size, not just its New York size) would not, because of the impact on competition, be permitted to acquire LIT, even though the acquisition by Barclays would admittedly not have the same impact, "to approve the application would be manifestly unfair to the major New York banking organizations of comparable size to Barclays."¹³³

This approach might be characterized as the "dog in the manger" theory of competition. It has, at least, the virtue of frankness. Certainly it can be argued that if the Superintendent's definition of "reciprocity" would not be yours or mine, he has nicely put the case that Barclays has received the "national treatment" required under the United States-Great Britain treaty.¹³⁴

The real question is what the decision portends for the future of foreign bank entry into the United States: the foreign lawyer looking at the decision would reason that all the foregoing exposition of the

eliminated by this application would not be significant." *Id.* at 18. The Recommendation even gives credence to Barclays' persuasive presentation (one assumes that the New York and the federal applications made relatively the same arguments) that "there is an important difference between the ability of the large New York City banks to compete for retail banking business on Long Island and the ability of Barclays, headquartered in London, to compete in that same market." *Id.* Nevertheless, in judging the effect of the proposition on potential competition, the Recommendation stated that "just as banking authorities in the United Kingdom would most likely regard the London operations of our biggest banks as strongly backed by the resources of the U.S. parent, we must take the same view of the Barclays group," *id.* at 19 (a unique measurement of indirect impact: how a foreign authority would view United States bank entry). On this theory "Barclays' New York 'presence' considering the overall resources of the Barclays group [is] at least comparable to the New York 'presence' of several of our major New York holding companies." *Id.* Potential competition, therefore, would be significantly lessened. *Id.* at 20. The "therefore" is a bit hard to follow: the simple statement, *id.* at 17, that "the Barclays group, with \$24 billion in assets, clearly has the financial capability to enter the Nassau-Suffolk area through a smaller acquisition," would seem to be the pivot of the analysis. Barclays' capacity for competitive effect is judged on its world-wide size. The real gravamen of the decision would seem to be simply that Barclays is not to be permitted to do what would be forbidden to its global competitors, the New York City multinational banks. "To do otherwise, would result in an unfair 'double standard' favoring foreign banks." *Id.* at 13.

¹³⁰ *Id.* at 11.

¹³¹ *Id.* at 12.

¹³² *Id.* at 13.

¹³³ *Id.* at 22.

¹³⁴ See note 22 *supra*.

bases of United States regulation of banking was useless. What he really needs to know to advise his client, in a dual banking system in which state law seems to rule supreme, is the degree to which the state supervisory authority, whatever its previous proclamations about the values of trade and exchange in an interdependent world, is determined to protect its domestic constituents from competition. What we, as United States policy makers, must concern ourselves with is the harm to be done to national economic policy by the present system of *carte blanche* to the state authorities to determine the fate of foreign bank entry. The Superintendent, for the purpose of assessing the impact of the acquisition, chose to treat Barclays as if it were a bank, if not of its world size, at least of some undefined "presence," headquartered in New York. But from the point of view of national policy toward banking structure, Barclays is not a New York bank and protection of the dual banking system does not demand that it shall be so treated. Foreign banks doing business in the United States are just that—unique beasts—and, after a brief description of the policy of the bank holding company legislation, we shall turn to the question of how the federal regulatory system has dealt, and in the future might deal, uniquely, with them.

F. Separation of "Banking" and Commerce

The prominence of the federal bank holding company legislation in the regulation of banking in the United States is evident from the number of references to the Bank Holding Company Act already made in this article. Discussion of the policy of the Act, however, has been saved for last because, unlike the other concepts of banking regulation previously discussed, the notion that joint ownership of the suppliers and the users of credit is an evil which must be forbidden per se is a relatively recent one, and one which Congress has only fully articulated in the 1970 Amendments. The 1930's banking legislation evinced concern over the nature of ownership of member banks by requiring those owning or acquiring control over a member bank to obtain a voting permit from the Board¹³⁵ and concern with the nature of other holdings of those controlling member banks by permitting the regulatory authorities to require reports on such affiliates.¹³⁶ Although the Board repeatedly suggested to Congress more thorough control over bank ownership and the growing phenomenon of bank holding company ownership of banks,¹³⁷ it was only in 1959, with the original enactment of the

¹³⁵ Pub. L. No. 89-485, 80 Stat. 243 (1966).

¹³⁶ 12 U.S.C. §§ 161, 334 (1970).

¹³⁷ See, e.g., 41 Fed. Res. Bull. 260 (1955).

Bank Holding Company Act, that concern with joint ownership of banking resources and users of credit was translated into a partial federal policy¹³⁸ of separation of banking and commerce.

The focus of the 1959 legislation was twofold, and the dichotomy remains in the present structure of the Act. One concern was to submit the possibilities for concentration in banking by the addition of formerly independent banks to a holding company system to scrutiny by the Board: thus section 3 of the Act required, and still requires, the permission of the Board before a bank holding company may become a bank holding company or acquire more than five percent of the voting shares of an additional bank or banks.¹³⁹ With the extension of the Act in 1970 to the one-bank situation, this prior permission requirement of section 3 applies to the acquisition by any group meeting the definition of "company" of twenty-five percent or more of the voting shares of an entity meeting the definition of "bank," and is the source of the extension of the Act to foreign bank entry by means of incorporation of a separate United States subsidiary bank.

Section 4 of the Act was, and still is, directed at the separation of "banking" from commerce by its prohibition upon the ownership by a bank holding company of more than five percent of the voting shares of any nonbank unless the company in question can be qualified under a specific exception to the general prohibition of section 4. Section 4 also prohibits bank holding companies from doing directly what they could not do indirectly through stockholdings. The original Act thus required bank holding companies covered by it to divest their nonqualifying business, and as we have seen, the finance company, Banccredit, was deemed nonqualifying under the Act as it was then interpreted because of its multistate locations.¹⁴⁰ As the Act was amended in 1970, it is section 4(c)(8) of the Act that sets the general standard for what nonbanking business and holdings are permissible to any holding company covered by the Act.¹⁴¹ However, in the 1970 Amendments, Congress provided in

¹³⁸ The political difficulties of enactment of the policy resulted in its application in 1959 to the situation of multibank ownership. An industrial system with a single bank affiliate was not covered until the 1970 Amendments, and even so, a grandfather clause protects ownership of single banks under a certain size. 12 U.S.C. § 1843(d) (1970) (§ 4(d) of the Act as amended). The clause includes a good statement of the separation policy: the banks whose systems may be exempted are those that are

so small in relation to the holding company's total interests and so small in relation to the banking market to be served as to minimize the likelihood that the bank's powers to grant or deny credit may be influenced by a desire to further the holding company's other interests.

¹³⁹ 12 U.S.C. § 1842 (1970).

¹⁴⁰ See text at notes 72-74 *supra*.

¹⁴¹ Section 4(c)(8) authorizes the Board to exempt from the prohibition shares of any company the activities of which the Board after due notice and

section 4(c)(9) for a special standard for judging the nonbanking business of foreign bank holding companies and it is under this provision of section 4 that the present federal jurisprudence on the application of the separation policy to foreign holders of stock of United States banks has been developed. However, before discussing the history of section 4(c)(9) and developments under it, we shall first take a brief look at the congressional efforts at direct regulation of foreign bank entry and the application of the general tenets of banking regulation to foreign entry proposed by those efforts.

III. THE 1966 AND SUBSEQUENT INITIATIVES FOR DIRECT REGULATION

The first response to Professor Zwick's study for the Joint Economic Committee was the introduction on August 25, 1966, in the Eighty-ninth Congress of S. 3765 by Senator Javits.¹⁴² The bill was intended to provide for exclusive federal control over foreign banking corporations operating within the United States. Thus, it would have ended the dual banking system, not only with respect to state licensing of direct entry, but also for any state bank in which a foreign banking corporation owned or purchased a sufficient interest to have actual control.¹⁴³ The bill's solution to the problem of geographical limitations on branching was most interesting: the federally licensed branches within one state were to be at locations permissible to a national bank, but branches could be authorized in states other than the state of initial entry if the laws of the additional

opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto.

12 U.S.C. § 1843(c)(8) (1970). The Board in Regulation Y, 12 C.F.R. § 225.4 (1973), has set out a list of activities which, *prima facie*, it considers to be a "proper incident" under § 4(c)(8). The general effort seems to be to draw a line between "financial" and "commercial" business, a line which as we shall see in connection with Lloyds' application to retain an export management company is not so simple to draw. See note 310 *infra*.

¹⁴² S. 3765, 89th Cong., 2d Sess. (1966). The bill was apparently hastily drafted and, inadvertently, would have raised a number of problems through poor draftsmanship. For example, the interplay between the definitions of "foreign banking corporation" and "controlled subsidiary" would have resulted in having the special controls set up by the bill apply to any banking subsidiary of a United States holding company controlling a foreign bank.

¹⁴³ Since the bill did not provide for special federal incorporation of the entities, it would have created an anomalous situation in which a foreign banking corporation desiring to do business in the United States through a separate corporation rather than a direct branch or agency would have to obtain either a national or state bank charter but then be subject to exclusive federal regulation under the Act. Thus, the bill, while on the one hand solving the problem for foreign banks of the limitations on entry by direct branching, would have discriminated against foreign banks by closing to them the option (available at that time) of avoiding federal regulation by incorporating a subsidiary bank under state law without opting for FDIC insurance or Federal Reserve membership.

states did not prohibit the "transaction of business by a foreign banking corporation." The bill, however, was never reported out of committee.

The following session of Congress saw two new bills¹⁴⁴ to regulate foreign bank entry introduced into the House, both of which also died in committee. In the meantime, Senator Javits' office apparently had been rethinking the issue, for on May 10, 1967, the Senator introduced S. 1741.¹⁴⁵ This new legislation, like its predecessor S. 3765, was intended to provide federal control over foreign bank entry, but this time substantial provision was made for state regulation. Instead of making the federal licensing mandatory, as S. 3765 would have done, S. 1741 would have permitted a foreign banking corporation to obtain approval for its agency, branch or controlled subsidiary from the state banking authority concerned, provided that the state authority submitted information with respect to the application to the Secretary of the Treasury, who could then determine that the new facility would not be in the "national public interest" as defined in the bill¹⁴⁶ and thereafter deny approval of the application. The states would also have been given a veto power over federal licensing of foreign bank entry since the Secretary was forbidden to approve a federal license for an agency, branch or controlled subsidiary "if under the laws of [the] State [where the operation is to be located] an agency, branch or

¹⁴⁴ H.R. 5411, 90th Cong., 1st Sess. (1967), introduced by Rep. Fino on Feb. 15, 1967, would have responded to the Canadian limitations on alien interests in Canadian banking by amending the Bank Holding Company Act and the Federal Bank Merger Act to prohibit the regulatory authority concerned from approving acquisitions, mergers or consolidations which would result in a holding company or bank, more than 25% of which was owned "by persons other than residents or citizens of the United States," from acquiring or combining with another bank if the country of origin of the shareholders or of the foreign company would not permit a similar transaction by a United States person, bank or holding company. Since at the time no reporting of nationality of shareholders was required under any banking or SEC regulations, it is hard to see how management of the banks or companies concerned was supposed to comply with this theoretically retaliatory legislation. H.R. 6856, 90th Cong., 1st Sess. (1967), introduced by Rep. Patman on March 8, 1967, was a much more broadly based bill intended to require federal licensing of foreign bank branches, agencies and controlled subsidiaries. However, unlike the Javits bill discussed in the text, the Patman bill made no attempt to make federal law exclusive. Moreover, the latter would have limited a foreign banking corporation either (depending upon how one reads the unclear drafting) to one place of business or subsidiary in the United States or else to one per state.

¹⁴⁵ S. 1741, 90th Cong., 1st Sess. (1967).

¹⁴⁶ S. 1741, 90th Cong., 1st Sess. § 2(b) (1967). The Javits bill definition is of interest in view of the Board's present interpretation of the "public interest" in the application of section 4(c)(9) of the Act. Section 2(b) defined the "national public interest" as being to encourage the legitimate activities of foreign banks in the United States, to encourage other nations to grant reciprocal privileges to banks chartered in the United States which operate or wish to operate abroad, and to promote the foreign commerce of the United States.

subsidiary of such corporation would not be permitted to carry on the business of banking."¹⁴⁷

S. 1741 would have made a desirable innovation in requiring the Federal Deposit Insurance Corporation to submit to Congress a proposal for amendment of the Federal Deposit Insurance Act so as to include branches of foreign banking corporations within its coverage. The bill, however, like its predecessor and its House counterparts, never got out of committee.

These initial attempts at direct federal regulation of foreign bank entry, while dealing with the questions of multiple locations and dual regulation, made no attempt to regulate non-bank holdings of foreigners entering the banking business in the United States. Since at the time the separation policy was only applied to holding systems owning two or more banks, the omission is not surprising. However, Representative Patman, the author of the first and most stringent of the bills that ultimately resulted in the 1970 Amendments, has more than made up for the omission by introducing H.R. 11,440 in November 1973.¹⁴⁸ The bill, which according to its title is "[t]o provide for Federal control over foreign banks and other foreign persons establishing, acquiring, operating, or controlling banking subsidiaries in the United States . . .," is so stringent that, if enacted in its present form, it would amount to a virtual prohibition on foreign interests in United States banks. H.R. 11,440 would solve the problem of the lack of federal regulation over direct entry by forbidding any foreign person to directly or indirectly engage in "banking" (a term undefined by the bill) in the United States except pursuant to the proposed legislation and then making no provision for the licensing of direct operations, other than representative offices (section 25). Section 22 would give presently existing operations two years in which to obtain the licenses required by the bill or else to close up. Foreign persons qualifying under other stringent requirements of the bill¹⁴⁹ would have (apart from representative offices) two options: either a federal charter for a company with powers copied from the Edge Act to do an international banking business or a state banking charter. Both the federal and state charters would require the consent of the Secretary of the Treasury, operating under guidelines limiting the total amount of foreign

¹⁴⁷ Id.

¹⁴⁸ H.R. 11,440, 93d Cong., 1st Sess. (1973) (introduced on Nov. 13, 1973).

¹⁴⁹ Section 4(b) would not permit licensing if the foreign person owns, or any of its affiliates own, more than 5% of any company engaged in any activity other than activity incidental to its international or foreign business. Section 4(b) of the bill contains other restrictions on licensing, but § 4(b)(3) is drafted in such a manner that it is not even possible to make out the intent of the provision. It may be aimed at preventing multistate operation.

banking in the country (a quota system, in effect), and would be valid only for five years. Since one of the conditions for licensing in section 4 is that no United States person own more than five percent of a banking organization licensed under the bill, and section 18 forbids purchase of shares by a United States person in any entity licensed under the bill, sale of the shares in the event of denial of renewal of the charter could only be made to another foreign group capable of obtaining a license. This sword of Damocles is hardly likely to encourage foreign entry. The federally incorporated entities would be subject to all the restrictions on affiliation with other business in the United States (restrictions far more severe than are imposed on domestic banks and their Edge subsidiaries by the Bank Holding Company Act), could only take deposits "as may be incidental to or for the purpose of carrying out international banking transactions,"¹⁵⁰ and would be required to carry on such restricted deposits the same amount of reserves as domestic banks that are members of the Federal Reserve System (but the option of System membership for whatever advantages such membership may confer would be denied). The only reason for application for such a federal charter would be that the bill would limit a foreign person to "one subsidiary which has been granted a State charter under this Act by more than one State"¹⁵¹ while permitting up to five subsidiaries with federal charters. Presumably these federal international banking subsidiaries are intended as a substitute for the New York, Illinois, California and other port area branches which may no longer be retained or established. Since the federally chartered subsidiaries would be limited in their deposit taking to internationally connected deposits, the possibility of multistate location of such subsidiaries is an interesting response to the problem of multistate branching and the Edge option available to domestic banks, just as the option of state chartering subject to federal permission is a response to the problem of the dual banking system.¹⁵² However, the bill makes no

¹⁵⁰ H.R. 11,440, 93d Cong., 1st Sess. § 9(a)(2)(H) (1973).

¹⁵¹ H.R. 11,440, 93d Cong., 1st Sess. § 13(a)(1) (1973).

¹⁵² The accommodation to the dual banking system, however, is one which imposes extraordinary hurdles on foreign entry. The effect of the bill is to permit full service banking only through the obtaining of a state charter which can be denied for any reason; there is no room under the bill for organization of a national bank and, indeed, the effect of the bill would be to prohibit over 5% of a national bank to be owned by foreigners. However, the states' power to incorporate banks would be severely limited by the requirement of federal approval under §§ 4 and 5 of the bill for any "bank" with more than 5% foreign ownership. The bill even contains a provision, § 5, that any bank presently controlled by "any foreign person or group of foreign persons" is subject to the licensing provisions (and thus possible forfeiture of the stock interest) and a bank more than 5% of which is owned by foreigners may be determined by the Secretary of the Treasury to be subject to the act and to the licensing requirements.

attempt to face up to the problems which have been raised by the application of the Bank Holding Company Act to foreign entry; instead it would make the conditions for federal approval of a state charter so stringent with respect to the holding of other interests by the foreign entrants as to make the present Bank Holding Company Act regulation seem positively lavish. The Patman bill in effect attempts to solve the issues of foreign bank entry by simple—and simple-minded—prohibition.

IV. BACKHANDED REGULATION UNDER THE 1970 BANK HOLDING COMPANY ACT AMENDMENTS

A. *Historical Perspectives and Section 4(c)(9) of the Act*

With the 1966 and 1967 direct regulation tentatives dying in committee, the regulatory picture for foreign banks in the United States remained stable until the introduction of one-bank holding company legislation, H.R. 6778,¹⁵³ by Representative Patman on February 17, 1969. Patman's bill was designed both to include one-bank holding companies within the ambit of the Bank Holding Company Act¹⁵⁴ and to revise the Act to make it even more restrictive than it had been in relation to multiple bank holding companies. Since, prior to 1970, foreign banks were regulated under the Act only if they established or gained control (as defined in the Act) of two or more separately incorporated "banks," the Patman bill (as well as the competing one-bank holding company bills that promptly followed it), by bringing companies owning only one "bank" under the Act, would necessarily have imposed federal regulation upon those foreign banks entering by means of one indirect subsidiary.

The increased potential for federal control over foreign banking entities provided by H.R. 6778 and its competitors carried with it the seeds of controversy over the proper scope of such regulation. Apart from limited exceptions,¹⁵⁵ the Act as originally promulgated in 1956 contained neither recognition of the problems of transnational banking nor any recognition of the extent to which the Act, if

¹⁵³ H.R. 6778, 91st Cong., 1st Sess. (1969).

¹⁵⁴ 12 U.S.C. §§ 1841-50 (1970). The initial impetus to the legislative intervention that resulted in the Bank Holding Company Act Amendments of 1970 was the sudden conversion of significant numbers of major banks into the holding company form of corporate structure and the moves by these companies to acquire nonbank subsidiaries. In 1965, there were 550 one-bank holding companies, controlling mainly small local banks, with only 4½% of all commercial bank deposits in the United States; by 1969 there were 890 one-bank holding companies, with 43% of all bank deposits in the country. See Blaine, *Registered Bank Holding Companies and the One-Bank Holding Company*, 26 Bus. Law. 9, 10 (1970).

¹⁵⁵ See, e.g., 12 U.S.C. § 1843(c)(9) (1970).

made applicable to foreign bank holding companies, would extend United States concepts of banking structure and regulation to the foreign activities of foreign companies. In 1956, the Act's lack of recognition of the problem of foreign bank entry was hardly crucial: the multinational banks that had entered the United States markets by the subsidiary route had chosen to do so only in New York, California and Illinois.¹⁵⁶ Apparently, only the international trade and money market centers were of interest as markets to potential foreign banking entrants, so the Act's virtual prohibition of future multistate banking did not then appear significant. Those few foreign banks covered by the pre-1970 two-bank test¹⁵⁷ did not have nonbank subsidiaries which would not fall within an exception to the apparent application of section 4 to foreign subsidiaries.¹⁵⁸ The Canadian banks that had both commercial bank subsidiaries and trust companies to do corporate finance work registered under the Act without difficulty; the Societe Generale, a Belgian bank, which had both a subsidiary incorporated under the New York law applying to commercial banks and an investment company subsidiary incorporated under Article XII of the New York Banking Law¹⁵⁹ convinced the Board that the investment company was not a "state bank, savings bank or trust company"¹⁶⁰ and consequently was not registered under the Act.

These registrations and applications for rulings on the status of subsidiaries by the foreign banks must have alerted the Board, however, to the problems inherent in the extraterritorial application of the Act, for the Board's 1966 bill to amend the Act by extending it to one-bank holding companies, S. 2353, contained an interesting new provision:

¹⁵⁶ The Zwick study—Joint Economic Comm., 89th Cong., 2d Sess., Foreign Banking in the United States 3 (Economic Policies and Practices, Paper No. 9) (Comm. Print 1966)—indicates that foreign bank subsidiaries existed only in those three locations in 1966.

¹⁵⁷ As of Dec. 31, 1965, only three foreign companies were registered under the Act: Bank of Montreal, Canada; Imperial Bank of Commerce; and The Bank of Tokyo, Ltd.

¹⁵⁸ One foreign bank had a representative testify in the Senate Hearings on the various proposed 1966 schemes of amendment to the 1956 Act. Louis Van Damme, Chairman of the Board of Belgian-American Bank and Trust Company, a subsidiary of the Société Générale de Banques, a Belgian commercial bank, indicated that inclusion of the Société Générale under the amendments as a bank holding company would not cause the Société difficulty with § 4 because "Belgian law . . . contains a section prohibiting banks from investing not only in stocks but also in bonds of non-banking organizations." Hearings on S. 2353, S. 2418, and H.R. 7371 Before a Subcomm. of the Senate Comm. on Banking and Currency, 89th Cong., 2d Sess., pt. I, at 256 (1966) [hereinafter cited as 1966 Hearings]. (The Société Générale had other difficulties with inclusion, notably the then § 6 of the Act on financial relationships among bank holding companies and their subsidiaries, a section which was repealed by the 1966 Amendments.)

¹⁵⁹ N.Y. Banking Law art. XII (McKinney 1971).

¹⁶⁰ 1966 Hearings, *supra* note 158, at 261.

The application of this Act and of section 23A of the Federal Reserve Act (12 U.S.C. § 371), as amended, shall not be affected by the fact that a transaction takes place wholly or partly outside the United States or that a company is organized or operated outside the United States: *Provided, however*, that the prohibitions of section 4 of this Act shall not apply to shares of any company organized under the laws of a foreign country that does not do any business within the United States, if such shares are held or acquired by a bank holding company that is principally engaged in the banking business outside the United States.¹⁶¹

Curiously, Governor Martin of the Federal Reserve Board did not comment upon this provision in his statement before the Senate subcommittee then holding hearings on S. 2353. Presumably, the new section was deemed to constitute a fair trade-off. The domestic companies that would now be covered as one-bank holding companies could not escape through foreign incorporation; but the treatment of fully "foreign" nonbank holdings of genuine foreign banks was to be left to foreign law. The limitation in the provision, however, should be of special note; in order not to have section 4 of the Act apply to foreign holdings, the foreign holding company itself must be "principally engaged in the banking business outside of the United States." It is impossible to tell, and the legislative history gives no clue, whether this limitation was a deliberate policy choice on the part of the draftsmen of S. 2353 or simply a lack of recognition that any genuinely foreign nonbanking corporation (that is, a corporation beneficially owned by non-United States persons) might own or acquire a sufficient interest in a United States bank and be required by the terms of the Act to divest its impermissible foreign holdings. The extension of the United States notion of the necessary separation between banking and industry¹⁶² to foreigners' foreign holdings on the basis of a single purchase of a minority interest in a United States bank is a rather extreme assertion of extraterritorial jurisdiction. On the other hand, S. 2353 also contained a repealer of the provisions of the Banking Act of 1933 requiring holding company affiliates of member banks to acquire voting permits from the Board to vote stock.¹⁶³ This would indicate that perhaps the asser-

¹⁶¹ S. 2353, 89th Cong., 1st Sess. § 2(h) (Aug. 3, 1965), introduced by Sen. Robertson at the request of the Board of Governors. This provision is codified at 12 U.S.C. § 1841(h) (1970) with minor changes.

¹⁶² See text at notes 135-39 *supra*.

¹⁶³ See text at note 135 *supra*.

tion of another form of control over foreign bank holding companies was deliberate.¹⁶⁴ Under such a policy, foreign banks would be exempted from the limitations on their foreign holdings on the theory that almost every jurisdiction scrutinizes to a certain extent the asset holdings of its banks, and that United States regulation could rely on and defer to the foreign regulation in this regard.¹⁶⁵

In any event, whatever the reasons behind the choices apparently made by the draftsman of the new section 2(h), the provision was carried over into the final 1966 enactment without explanation. No foreign bank commented on it in the Senate hearings, no congressman mentioned it in debate, and the Senate report on the bill offered no rationale. No matter, for the Senate Committee had removed S. 2353's real stinger—the provision for extension of the Act's coverage to one-bank holding companies. Thus, the peculiarities of section 2(h) could await notice until the next time that issue came before the House, with the introduction by Representative Patman of H.R. 6778 before the Ninety-first Congress.

In the lengthy, cliff-hanging, and often bitter progress of the one-bank company legislation, a number of competing definitions of "bank holding company" appeared in the series of House and Senate bills introduced to extend the Act to the one-bank situation. However, all of these definitions would have subjected a foreign group holding or acquiring control of a commercial bank doing business in the United States, as in some bills,¹⁶⁶ or of a United States chartered

¹⁶⁴ The subjection of "nonbank" foreign subsidiaries to the tests of § 4 did not include a foreign company's foreign bank holdings even though such a foreign bank was not a "bank" for the purposes of § 3 of the Act. In order to insure that United States bank holding companies could invest abroad in bank stock without prior approval of the Board of Governors, the Act both in its original form and after the 1966 Amendments exempted from § 4 shares of a company "organized under the laws of a foreign country and which is or is to be engaged principally in the banking business outside the United States." Pub. L. No. 89-485, § 8(c)(9), 80 Stat. 239 (1966). The parallelism of this language and that of S. 2353's proposed § 2(h) proviso make one suspect that the draftsman of S. 2353 failed to distinguish between foreign bank holding companies and foreign bank subsidiaries.

¹⁶⁵ Section 2(h) contains other drafting conundrums: Just what exactly is meant by a company "that does not do any business within the United States"? Is a foreign company doing business in the United States if it has such contacts that it would be subject to United States process (under United States constitutional notions of the jurisdictional requisites for due process)? To taxation? To state qualification requirements? Or does "business" mean an office, an establishment as that term is usually defined in tax treaties? Is a foreign company doing business in the United States through a separately incorporated subsidiary doing business so as to make it a company which must be qualified under § 4? As will be seen, once the Act was broadened to take in one-bank holding companies, the Board of Governors had to struggle with all the problems of inclusion and exclusion—and the policy that should be applied—that were raised by § 2(h).

¹⁶⁶ Some of the bills, by leaving intact the definition of "bank" in the Act as amended in 1966, would have ended up covering certain foreign banks with a United States branch. Between its enactment in 1956 and the enactment of the 1966 Amendments, the Bank Holding Company Act defined "bank" as "any national banking association or any State

commercial bank, as in others, to regulation under the Act without distinction from a domestic bank holding company, except to the extent already provided for in section 2(h) of the Act.¹⁶⁷ The implications of the proposed legislation for foreigners holding interests in banks doing business in the United States would seem not to have been immediately apparent to the foreign groups: the House hearings¹⁶⁸ on H.R. 6778, held in April 1969, do not contain a single statement by a representative of a foreign group. While H.R. 6778 as it emerged in July 1969 from the House Banking and Currency Committee was a different bill than had gone to the Committee,¹⁶⁹ no provision for the effect on foreign interests of the proposed amendments had been made.¹⁷⁰

bank, savings bank, or trust company," ch. 240, § 2(c), 70 Stat. 133 (1956), so that a foreign bank regardless of its corporate structure could not become a "bank" under the Act by establishing a branch in the United States. The definition also specifically excluded "any organization that does not do business within the United States" so as not to cover American Express International Banking Corporation, which is incorporated as a Connecticut bank. However, the 1966 Amendments changed the definition to "any institution that accepts deposits that the depositor has a legal right to withdraw on demand," Pub. L. No. 89-485, § 3, 80 Stat. 236 (1966), without any recognition that the new definition would include any commercial bank in the world that could not escape under the American Express provision. Whatever might be the full extent of the meaning of "that does not do business within the United States," a direct branch could not be ignored and Barclays Bank Limited, owning a California bank subsidiary and Barclays D.C.O., its foreign banking subsidiary, with branches in New York, suddenly found itself a two "bank" holding company subject to the federal Act. The result was the jurisdictionally unedifying spectacle of the Board passing on the acquisition abroad by Barclays of shares of the Bank of London and South America Limited, another English bank, because that bank also was a "bank" under the Act because of its New York branch. See *In re* the application of Barclays Bank Limited, London, England, for approval of the acquisition of 1,336,633 voting shares of the Bank of London and South America Limited, 56 Fed. Res. Bull. 734 (1970). Fortunately for groups holding interests in foreign banks with United States branches, the definition of "bank" in H.R. 6778 as it emerged from the Senate Banking and Currency Committee markup was that of the present Act, i.e., a definition not only in terms of function, but also in terms of place of incorporation.

¹⁶⁷ See text at notes 160-66 *supra*.

¹⁶⁸ Hearings on H.R. 6778 Before the House Comm. on Banking and Currency, 91st Cong., 1st Sess. (1969).

¹⁶⁹ See H.R. Rep. No. 387, 91st Cong., 1st Sess. (1969).

¹⁷⁰ The Committee of Foreign-Owned Banks, in its comments to the Board on proposed administrative regulations implementing the special section on foreign bank holding companies that ultimately was adopted as part of the 1970 Amendments (see text at notes 216-26 *infra*), claims that following informal consultations with the staff of the Federal Reserve Board, it proposed a modification to the House bill "designed to avoid undue extraterritorial regulation" which was communicated to the staff of the House committee. See Committee of Foreign-Owned Banks, Comments on the Proposed Regulations under Section 4(c)(9) of the Bank Holding Company Act (Aug. 5, 1971) (paper in the files of the Board of Governors of the Federal Reserve System). According to the Committee of Foreign-Owned Banks, "[t]he House Committee gave broad exemptive authority to the Board." Statement of the Committee of Foreign-Owned Banks [hereinafter cited as FOB Statement], reprinted in Hearings on S. 1052, S. 1211, S. 1664, S. 3823 and H.R. 6778 Before the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 1323-25 (1970) [hereinafter cited as Senate Hearings]. However, I have been unable to find such a provision in H.R. 6778 as it emerged from the House Committee.

Apparently, however, by that time there was substantial awareness on the part of both the foreign banks and the Federal Reserve Board of the unalleviated scope of the proposed amendments, and when the bill came to the House floor on November 5, 1969, two separate floor amendments were offered which in part dealt with the situation. As soon as the debate opened, Representative Bevill offered an amendment containing a new exception to section 4 of the Act:

(12) shares held or activities conducted by any company organized under the laws of a foreign country the greater part of whose business is conducted outside the United States, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulation or order, the exemption would not be substantially at variance with the purposes of this Act and would be in the public interest by directly or indirectly facilitating the foreign commerce of the United States.¹⁷¹

Representative Bevill did not discuss this portion of his amendment, nor did the debate touch on it at all, but its origin was, presumably, either the foreign banks or the Board, and, given the grant of discretion to the Board, one suspects it was the latter. The significant point about the provision was that the grant of discretion to the Board is very large: the holding of *any* shares, or the conduct of *any* activities, whether domestic or foreign, might be authorized if the company holding the shares or conducting the activities is chiefly foreign; the exemption would not be substantially at variance with the purposes of the Act; and it could be seen—note the language “directly or indirectly”—as facilitating foreign commerce. It is important to note that the exemption is not by its terms restricted to foreign holdings or activities of foreign companies. Under it, a foreign company could hold a sufficient number of shares in a domestic bank to be subject to regulation under the Act but be exempted from the application of its section 4 to the company's nonbank subsidiaries upon the finding that such an exemption would be in accord with the purposes of the Act, and would facilitate United States foreign commerce. Thus, under the Bevill amendment, the Board was afforded a flexibility, not previously provided by the Act, to determine whether it would be in the public interest not to extend United States concepts of the separation of banking and commerce to foreign companies holding interests in United States banks.

¹⁷¹ 115 Cong. Rec. 33,125 (1969).

The second floor amendment affecting the coverage of foreign banking interests was offered by Representative Ashley. The amendment had two parts, the second part giving the Board discretion to exempt from the Act the peculiarities of corporate structure under which American Express conducts its international business.¹⁷² The first portion of the amendment responded to the problem for foreign banks inherent in the way the Act at that time defined "bank"¹⁷³ and would have permitted the Board to exempt from the Act ownership of a bank organized under the laws of a foreign country "the greater part of whose business is conducted outside the United States."¹⁷⁴ While the combination of the broad definition of "bank" and discretion in the Board to continue or discontinue coverage under the Act for foreign banks entering directly was not an ideal way to provide for federal regulation of foreign bank entry,¹⁷⁵ it had the advantage of avoiding the anomaly of the present Act that foreign bank entry is covered only if entry is by means of acquisition of a United States chartered bank. However, when H.R. 6774 reached the Senate, the definition of "bank" was changed to include only United States chartered banks and although the Senate committee bill included the Ashley provision for American Express, the first part of the amendment was omitted, presumably as no longer necessary.

Both the Bevill and the Ashley amendments were accepted by the House, and thus H.R. 6778 as it passed the House would have, in each case subject to Federal Reserve Board determination that the action would be in the public interest (defined as facilitating the foreign commerce of the United States), permitted exemption from section 4 for activities and subsidiaries of foreign holding companies and exemption from section 3 for the holding of shares of foreign banks with United States business.

Both of these provisions received the support of Chairman Burns of the Board in his testimony before the Senate Committee on Banking and Currency which held hearings in May 1970 on the House-passed bill and the other one-bank holding company bills.¹⁷⁶ Burns in his testimony stated clearly what Representatives Bevill and Ashley had not stated in offering their amendments—the prime

¹⁷² Id. at 33,141. However, American Express was not satisfied with this provision. It preferred not to be covered by the Act at all and so submitted a statement to the Senate hearings. See Senate Hearings, *supra* note 170, at 1281ff.

¹⁷³ See note 166 *supra*.

¹⁷⁴ 115 Cong. Rec. 33,141 (1969).

¹⁷⁵ It is not ideal because initial application of the Act would depend not on the fact of United States entry, but on whether or not the foreign bank was controlled by a holding company.

¹⁷⁶ See Senate Hearings, *supra* note 170.

issue of extraterritorial jurisdiction, the assertion by the United States of control over *foreign* activities of foreign banks or other groups on the basis of their participation in United States banking. He first explained why, literally, the Act would apply, and then added:

We do not believe Congress intended the Act to be applied in such a way as to impose our ideas of banking upon other countries. To do so might invite foreign retaliation against our banks operating abroad, to the detriment of the foreign commerce of the United States. The provisions of the House-passed bill authorizing the Board to grant exemptions in this area would be most useful in dealing with these problems.¹⁷⁷

Burns thus made clear that, in the Board's view, "facilitating the foreign commerce of the United States" meant not so much whether or not the United States business of the foreign entity was itself directly connected with international commerce, but whether the regulation of the entity under the Act might invite retaliation abroad so as to impede United States foreign trade and investment. If Chairman Burns was not propounding a theory of jurisdictional self-restraint, at least he was articulating a notion of the importance of comity to multinational banking. We begin to see here the first glimmerings of the idea that perhaps multinational banking requires separate treatment, a realization that our particular domestic notions of the structure of banking regulation need not be gospel to be spread throughout the world community. We shall see just how far the Board ultimately was willing to carry this approach which, in the form of the Beville amendment, was accepted by the House and then articulated by Chairman Burns.

The other strand of thought in regulation of foreign bank entry—the fear of foreign competition—was also raised in these hearings, albeit by a very brief reference. Senator Bennett questioned the representatives of the United States banks with extensive foreign interests testifying before the Committee as to whether foreign-owned banks operating in the United States were subject to the holding company laws. Upon being assured that subsidiaries were "subject to the same law and regulation as any other bank which operates in New York State,"¹⁷⁸ Senator Bennett said: "I am glad to get that straightened out. I want to be sure that foreign corporations cannot unfairly compete in this respect with U.S. corporations."¹⁷⁹

¹⁷⁷ Id. at 145-46.

¹⁷⁸ Id. at 797.

¹⁷⁹ Id.

By this time, the foreign companies with banking business in the United States, or at least in New York, were following closely the pending legislation and had organized themselves into a lobby. The Committee of Foreign-Owned Banks, representing twenty-one foreign-owned banks located in New York, engaged counsel and submitted written "comments" (the Statement) on the bills and the testimony at the hearings to the Senate committee.¹⁸⁰ The Statement presented a number of concerns which ultimately were reflected in the Board's regulation¹⁸¹ issued under the Bevill amendment as enacted in section 4(c)(9) of the Act as amended in 1970. The Committee pointed out that coverage of one-bank holding companies would bring several dozen foreign-controlled bank holding companies under the law, unless exemption were provided. It stressed the problems that would be caused if foreign holdings of foreign companies could not be exempted, in particular the problem of disclosure of information concerning the foreign holdings.¹⁸² While supporting the Bevill and Ashley amendments, the Committee of Foreign-Owned Banks noted that "there is virtually no legislative history in the House to explain the intent of this rather elaborate language" and urged that the Senate Banking and Currency Committee include in its report "its anticipation of how the authority might be used"¹⁸³ By this the Committee meant that the Board should be required to issue "regulations of general application as soon as practicable after enactment of the law," and that the regulations should provide for freedom from extraterritorial regulations "in reliance on the power granted to the administering agency to reassert such regulation as may be necessary if and when abuses

¹⁸⁰ FOB Statement, *supra* note 170.

¹⁸¹ The Board's regulation issued under authority of § 4(c)(9) is Regulation Y § 225.4(g), 12 C.F.R. § 225.4(g) (1973).

¹⁸² The Bank Holding Company Act in § 5 requires all holding companies covered by the Act to register and to file such reports and to submit to such examinations as the Board may require. The Board at present has elaborate forms requiring full financial disclosure for both registration and annual reports (Forms F.R. Y-5, F.R. Y-6). In response to the special disclosure problems of foreign bank holding companies, the Board has provided a separate form for annual reporting by such companies (Form F.R. Y-7).

The Statement pointed out that stockholding by banks is a different affair in foreign countries which

have not found it necessary to separate commercial and investment banking by law.

Competitive conditions in these countries require banks to take investment positions with respect to non-banks in connection with underwriting, investment banking and merchant banking activities. This country has too great an economic stake overseas to say directly or indirectly to foreign banks that the price of doing a banking business in the United States is to make over their banking business at home in the image of the bank system in the United States.

FOB Statement, *supra* note 170, at 1323-24. The iron fist of retaliation was ever so clearly being raised in the polite glove of the Statement's measured form.

¹⁸³ *Id.* at 1324.

resulting from overseas activities might develop."¹⁸⁴ Interestingly, the Statement did not point out the possible broad scope of the Bevill amendment and did not urge any special treatment of the United States business of the Committee's member banks; presumably the Committee was aware of the fear which had been expressed in the Senate Hearings by Senator Bennett¹⁸⁵ that foreign banks might have competitive advantages through freedom from domestic regulation and decided that the course of political wisdom would be to leave that slippery topic alone.

The hearings were held in May. After intensive lobbying and two Committee Prints, the Senate Banking and Currency Committee reported out its version of H.R. 6778 on August 10, 1970. The lobbyists for institutions engaged in international banking had also been busy. The Senate committee bill preserved the second part of the Ashley amendment so as to permit the Board to exempt from regulation under the Act a bank holding company owning or controlling a bank operated in the United States principally for the purpose of conducting or facilitating transactions in foreign commerce.¹⁸⁶ Although as added to the House bill by Representative Ashley, the provision was intended as an exemption for American Express, the Senate Committee Report explained the purpose of this exemption, which easily could be given a very narrow construction:

to insure that there be no attempt to regulate the activities of a company located in a foreign country, doing business in foreign countries, so long as the Board finds that this exemption would not be substantially at variance with the purposes of the Act and would be in the public interest. To do otherwise might incur similar attempted foreign regulations of American companies doing business in other countries.¹⁸⁷

Presumably what the draftsman of the Senate Report meant to refer to was the provision in the Senate committee bill¹⁸⁸ paralleling the Bevill House amendment providing for exemption from the prohibitions of section 4 of the Act for activities and holdings of foreign bank holding companies, which ultimately became the present section 4(c)(9). However, unlike the Bevill amendment, the provision in

¹⁸⁴ *Id.*

¹⁸⁵ See text at notes 178-79 *supra*.

¹⁸⁶ Section 101 of H.R. 6778, adding § 2(a)(5)(D) to the Act. 116 Cong. Rec. 31,816 (1970).

¹⁸⁷ S. Rep. No. 1084, 91st Cong., 2d Sess. (1970), reprinted in U.S. Code Cong. & Ad. News 5540 (1970).

¹⁸⁸ Section 103(5) of H.R. 6778, 116 Cong. Rec. 31,817 (1970).

the Senate committee version did not contain the definition of public interest as facilitating the foreign commerce of the United States.

No changes in these provisions of the committee bill were made on the Senate floor when the bill was debated on September 16, 1970, and the Senate passed the bill the same day. As H.R. 6778 emerged from conference, all of the Ashley amendment provisions had disappeared,¹⁸⁹ but American Express retained the nondiscretionary exemption it had preferred and had gotten into the new Senate definition of "bank."¹⁹⁰ Representative Bevill's exemption for nonbank holdings and activities of foreign corporations was retained in the Senate bill form—that is, without the definition of public interest as facilitating the foreign commerce of the United States—as Section 4(c)(9) of the Act.

It should be recalled at this point that, so far as foreign *banks* are concerned, the new section 4(c)(9) is necessary only to exempt shares held in companies incorporated in or doing business in the United States, since under section 2(h) of the Act, untouched by the 1970 Amendments, foreign subsidiaries (of foreign *banks*) that do no business in the United States are already home free. The notable point about the language of section 4(c)(9), as was true of the Bevill amendment, is that it can apply to *either* foreign *or* United States nonbank subsidiaries of foreign bank holding companies, if the Board sees fit, in accordance with the public interest, to exempt them. But here the question is, what is the public interest? The initial guide to this question, contained in Representative Bevill's amendment—that is, the facilitation of the foreign commerce of the United States—had been removed in the final incorporation of the provision into the Act. Neither the Senate committee report nor the conference report¹⁹¹ offers any explanation of the deletion of the phrase.

The draftsman of the conference report did not appear to

¹⁸⁹ It is some indication of the staff's problems when legislation as complicated as this is negotiated and renegotiated to passage that the Statement of the Managers on the Part of the House, U.S. Code Cong. & Ad. News 5561 (1970) [hereinafter cited as Statement of the Managers], refers to the Ashley exemption although it was no longer in the conference bill agreed to by the House and Senate. 116 Cong. Rec. 41,483-89 (1970).

¹⁹⁰ This was the exemption from the definition of "bank" of "any organization which does not do business within the United States except as an incident to its activities outside the United States," § 2(c) of the Act, 12 U.S.C. § 1841(c) (1970). The American Express language conceivably could be used by an incorporated branch of a foreign bank to argue for an exemption from the Act if the subsidiary bank could show that all of its business was linked ("an incident") to the parent's international or foreign business. Presumably, because it is as easy to apply for authorization under § 3 as it is to get a ruling as to exemption under this provision, no foreign bank, to my knowledge, has made this argument, but the argument would be a useful one to circumvent § 3(d), prohibiting multiple-state "banks."

¹⁹¹ Conference Report on H.R. 6778, H.R. Rep. No. 1747, 91st Cong., 2d Sess. (1970), reprinted in 116 Cong. Rec. 41,481-83 (1970). Statement of the Managers, *supra* note 189.

understand the effect of the foreign-related provisions, since the report stated that the conference bill included exemption from regulation under section 4 of the Act for (a) any company the greater part of whose business is conducted outside of the United States, and (b) any company doing no business in the United States, in both situations as long as such business is an incident to foreign business, if the Federal Reserve Board finds that the exemption would not be substantially at variance with the purposes of the Act and is in the public interest (in substance in both versions of H.R. 6778).¹⁹² Both

¹⁹² 116 Cong. Rec. 41,482 (1970). What the Conference Report seems to have done is to elide the provisions of two separate sections of the conference bill. Besides the Bevell provision, which became § 4(c)(9) of the Act, the Senate committee bill contained in § 103(6) the provision which became the present § 4(c)(13) of the Act, exempting from § 4 of the Act shares of, or activities conducted by, any company which does no business in the United States except as an incident to its international or foreign business, if the Board by regulation or order determines that, under the circumstances and subject to the conditions set forth in the regulations or order, the exemption would not be substantially at variance with the purposes of this Act and would be in the public interest.

Id. at 11,688. Prior to the 1970 Amendments, § 4 had contained an absolute exemption from § 4 (in a paragraph then numbered 4(c)(9)) for "shares of any company which is or is to be organized under the laws of a foreign country and which is or is to be engaged principally in the banking business outside the United States." This exemption would have permitted United States bank holding companies to expand their banking business abroad without supervision by the Board; as a result the Board opposed it and Chairman Burns recommended its removal or amendment. Senate Hearings, *supra* note 170, at 145. However, the United States multinational banks—which until that time had acquired their overseas interests pursuant to the authorization contained in the Edge Act and a 1966 amendment to § 25 of the Federal Reserve Act and subject to the capital investment limitations therein, 12 U.S.C. §§ 601, 618 (1970)—had converted to the newly fashionable one-bank holding company structure and were anxious to obtain as much freedom as possible for overseas investment by their holding companies. The Act provision quoted above would have permitted the holding companies to acquire interests in foreign banks free of any restrictions and § 2(h) of the Act would permit under the right set of circumstances such foreign banks to freely retain their purely foreign holdings. The Bevell language would also help greatly to exempt holdings of foreign affiliates. But with the increasingly global scope of the business of multinational banks, to be forced to limit foreign investment to the confines of provisions never intended to cover such investments was absurd and the thought of having foreign investments judged by § 4 domestic standards set out in the House bill horrendous: the banks pushed for as much freedom for their holding companies to go abroad as possible. "In addition to these suggestions, we would urge that foreign affiliates principally engaged in activities outside the United States be exempted." Testimony of David Rockefeller, President of the Chase Manhattan Bank, N.A., in Senate Hearings, *supra* note 170, at 789.

We think it essential that U.S. banks be allowed to compete abroad on equal terms without foreign competitors. It is therefore necessary that section 4(c)(9) of the 1956 act [former § 4(c)(9) as quoted above] be amended to permit U.S. bank holding companies to engage in any activities in foreign countries permitted by the laws of those countries.

Testimony of A.W. Clausen, President of Bank of America, in *id.* at 785. The result was a compromise: § 4(c)(13) covers investment in, and activities of, any company (not just foreign banks) which, in language paralleling that of the Edge Act, is foreign, not by place of incorporation, but in the sense that its United States business, if any, is only incidental. At the same time, however, the exemption is subject to the Board's discretion. The conference bill

the House¹⁹³ and the Senate¹⁹⁴ made extensive comments upon, and additional explanations of, the conference report before accepting it. At no place in the debate, however, was there any mention of the provisions concerning foreign interests. Only by accident do we have some indication as to why first the Senate and then the conferees removed the only guide to a concept of "public interest" in the discretionary exemption for foreign activities and foreign-owned subsidiaries. In the House debate on the conference bill, Representative Widsall included in the record a letter from the General Counsel of the Treasury commenting on the differences between the House and Senate versions of H.R. 6778. The letter included the following paragraph:

Also, with respect to the exemption which would be granted for foreign banking under both bills, we believe it to be highly desirable that there be omitted the restrictive words "by directly or indirectly facilitating the foreign commerce of the United States." These words, which appear . . . [in] the House bill, are not contained in the Senate bill. These words are unnecessarily restrictive as there can be other ways in which exemptions for foreign banks can be in the public interest as, for example, avoiding the possibility of retaliation against American branch banks abroad.¹⁹⁵

Counsel for the Treasury apparently was opining without having looked at Dr. Burns' Senate hearing testimony, in which Burns had made it clear that the purpose of the phrase was to insure that the "public interest" would be interpreted as avoidance of interference with United States foreign commerce by regulation provoking retaliation against American companies abroad. In any event, the letter does suggest that the conferees utilized the Senate version because the additional language in the House version was open to the Treasury's interpretation. If the Board has *any* guide to congressional intent in section 4(c)(9), it is that the Act shall be administered so as to further, not impede, world commerce.

kept this provision of the Senate bill as well as the Senate version of the Bevill amendment. The terms of § 4(c)(13) could equally well be applied to holdings of foreign bank holding companies as well as to foreign holdings of domestic bank holding companies, but the Board has respected origins and in Regulation Y, 12 C.F.R. § 225.4(f) (1973), has interpreted § 4(c)(13) as applying only to domestic bank holding companies. As a result, § 4(c)(13) is not treated in this article.

¹⁹³ 116 Cong. Rec. 41,949-64 (1970).

¹⁹⁴ *Id.* at 42,422-38.

¹⁹⁵ *Id.* at 41,955.

B. *The Board Implements Section 4(c)(9)*
by *General Regulation*

The Amendments to the Bank Holding Company Act were approved on December 31, 1970,¹⁹⁶ and the Board set to work to amend Regulation Y,¹⁹⁷ the Board regulation covering the Board's supervision of bank holding companies pursuant to the Act, to accommodate the changes in the Act made by the Amendments. Given the pressing problem of redefining the nonbank activities permissible for domestic holding companies under the completely rewritten section 4(c)(8), despite the pleas of the Committee of Foreign-Owned Banks for an early general regulation,¹⁹⁸ the Board did not issue a proposed provision implementing the new section 4(c)(9) until June 1971.¹⁹⁹ As issued, the proposed regulation sent shock waves through the foreign bank community.

As noted previously, despite Chairman Burns' concentration in his Senate committee testimony upon the problem of United States regulation of *foreign* activities of foreign companies, section 4(c)(9) of the Act is not by its terms restricted to *foreign* activities. So long as the holding company itself is "foreign," that is, organized under the laws of a foreign country, and the greater part of its business conducted outside the United States (a term which the Board would have to define), the Board could choose not only to provide special treatment for *foreign* activities and holdings of the company, but could also establish a standard (so long as the standard is not "at variance with the purposes of the Act") for *domestic* activities and acquisitions by the foreign company differing from the standard which is set out for nonbanking activities and holdings of domestic holding companies (under section 4(c)(8) of the Act and under section 225.4(a) of Regulation Y²⁰⁰ issued thereunder). Despite the urging of the Committee of Foreign-Owned Banks that Congress provide the Board with adequate guidelines, the legislative history of section 4(c)(9) offered no guidance at all on this point. The most the Board had to go on in making its determination of what was in the public interest under section 4(c)(9) was Burns' and the Treasury Counsel's statements concerning the importance of avoiding foreign

¹⁹⁶ Pub. L. No. 91-607, 84 Stat. 1761 (1970).

¹⁹⁷ 12 C.F.R. pt. 225 (1973).

¹⁹⁸ See text at note 184 *supra*.

¹⁹⁹ Proposed amendment to 12 C.F.R. pt. 222 (as pt. 225 was then numbered), 36 Fed. Reg. 11,944 (1971). The original proposal would have added a new subparagraph (f) to 12 C.F.R. § 222.4 to set forth the ground rules for nonbanking activities and interests of foreign bank holding companies; when the regulation appeared in final form, 36 Fed. Reg. 21,807 (1971), it was numbered subparagraph (g) of 12 C.F.R. § 225.4 (1973). The regulation will be referred to hereinafter as either § 225.4(g) or "the foreign bank holding company regulation."

²⁰⁰ 12 C.F.R. § 225.4(a) (1973).

retaliation. Chairman Burns appeared to be directing himself primarily to the problem of extraterritorial effect of bank holding company regulation, but if the public interest is seen as avoiding the possibility of incurring foreign retaliation for "impos[ing] our ideas of banking upon other countries,"²⁰¹ a freer regime, within the broad outlines of the purposes of the bank holding company legislation, for foreign bank holding companies and their holdings *within* the United States might be warranted.²⁰²

The Board, however, for reasons best known to itself, chose in its proposed regulatory implementation of section 4(c)(9) to move in the opposite direction, not only failing to provide any special treatment for domestic holdings of foreign companies covered by the Amendments, but limiting the proposed general exemption of section 4(c)(9) for "foreign" holdings very strictly. Section 4 of the Act applies to any stockholding by any bank holding company²⁰³ (except those holdings specifically excepted) of over five percent of the outstanding voting shares of non-"banks." If a policy decision is to be made that holdings by foreign bank holding companies (as

²⁰¹ Testimony of Chairman Burns, in Senate Hearings, *supra* note 170, at 145.

²⁰² It would be unfair, however, to assume that because § 225.4(g), in both proposed and final form, treats (with the exception discussed in the text at note 230 *infra*) only "foreign" activities of foreign bank holding companies, the Board has read § 4(c)(9) to provide a special standard for such activities alone, relegating "domestic" activities of foreign bank holding companies to § 4(c)(8) of the Act. Section 225.4(g) sets out the nonbanking activities and holdings that are considered exempt from § 4 without a special proceeding. Both the proposed and the final regulation provide that a foreign holding company, if it is "of the opinion that other activities or investments may, in particular circumstances, meet the conditions for an exemption under section 4(c)(9) of the Act may apply to the Board for such a determination. . . ." As will be obvious from the text, the attempt to carve out by general regulation what activities and holdings should be treated as "foreign" presented difficult drafting and policy problems: to carve out, except on a case-by-case basis, just what domestic activities might meet the § 4(c)(9) standard may not be possible. However, the Board's introduction to the proposed regulation could be read as if the Board were viewing § 4(c)(9) as looking only to problems of extraterritorial effect of the Act. See 36 Fed. Reg. 11,944 (1971). Curiously, by the time of the final regulation, the point of origin had taken a 180 degree turn: the introduction to the final regulation described the purpose of the proposed regulation to be "to implement [the Board's] regulatory authority under § 4(c)(9) of the Bank Holding Company Act to exempt foreign bank holding companies from the prohibitions of section 4 of the Act with respect to certain of their non-banking activities and interests *in the United States*." 36 Fed. Reg. 21,807 (1971) (emphasis added).

²⁰³ The Act in its present form defines a "company" in § 2(b) as "any corporation, partnership, business trust or association . . ." 12 U.S.C. § 1841(b) (1970). Under § 2(a) a "company" becomes a "bank holding company" by having or acquiring "control" of a "bank" as defined by the Act. 12 U.S.C. § 1841(a) (1970). "Bank" is defined in § 2(c), 12 U.S.C. § 1841(c) (1970). "Control" is defined by § 2(a)(2) of the Act as the power to vote 25% or more of any class of voting securities of the bank; control of the election of a majority of the directors of the bank; or such a determination by the Board after a hearing. 12 U.S.C. § 1841(a)(2) (1970). The nationality of the entity so controlling the "bank" is not germane to the definition. Section 4(c)(9) in effect defines a foreign bank holding company as one "organized under the laws of a foreign country the greater part of whose business is conducted outside the United States." 12 U.S.C. § 1843(c)(9) (1970).

defined by section 4(c)(9)) in "foreign" companies are to be given a blanket exemption, that is, are to be exempted from section 4's divestiture requirement without separate consideration by the Board of the appropriateness of each holding, then, in a world where national boundaries hardly delimit business transactions, a prior determination must be made as to just what *is* "foreign" in the sense of inappropriateness of the assertion of jurisdiction under the Act over the holding. Section 4(c)(9) itself only offers a definition of "foreignness" for the holding company itself, not for the company's activities or holdings.

Without guidance from section 4(c)(9), the Board had a number of other possible treatments of the concept of "foreign" to chose from. It will be recalled that the Act's statutory exemption for certain foreign holdings of certain foreign bank holding companies, section 2(h),²⁰⁴ requires that the "foreign" company so held both be incorporated abroad and do *no* business in the United States. Once it is admitted that a company may have some United States business and still be "foreign," where is the line to be drawn? By quantity? The quantity concept raises a host of other questions, having to do with what entity should be considered. For example, in determining the quantum of United States business, what account should be taken of a United States-incorporated subsidiary of a foreign company? Should a bank holding company holding ten percent of a foreign company with a United States subsidiary be considered to own a ten percent interest in a domestic company subject to the rigors of section 4(c)(8)? Or should indirect holdings be considered only if the foreign bank holding company controls the foreign parent? Or should the United States subsidiary simply be viewed as an incorporated branch of the foreign parent and its accounts consolidated with the parent in determining whether the parent is foreign or domestic? Any regulation purporting to exempt foreign activities (rather than starting from the point of view as to what transnational activities might be functionally appropriate) must struggle with these questions.

As opposed to a quantity concept, section 4(c)(13)²⁰⁵ of the Act offered the Board another approach which might be designated as a "functional" one: it is the *quality* of the United States business, which must be "incidental" to the foreign or international business of the company, which determines whether the activity will be viewed as domestic or foreign.

Soon after enactment of the Amendments, the Board itself adopted, albeit for another purpose, a standard presumably bor-

²⁰⁴ 12 U.S.C. § 1841(h) (1970).

²⁰⁵ 12 U.S.C. § 1843(c)(13) (1970). See note 192 *supra* and note 211 *infra*.

rowed from the "establishment" concept in tax treaties. Section 5(a) of the Act²⁰⁶ requires newly covered companies to register on forms to be provided by the Board. The Board's new Registration Statement required disclosure by the Registrant of its holdings in other companies and submission of financial information with respect to such companies. However, such disclosure in the case of companies organized under foreign law was only required where the holding was sufficient in amount of shares held to constitute the foreign company a "subsidiary" as defined in section 2(d)²⁰⁷ of the Act (twenty-five percent or more of the voting stock or certain other indicia of control) *and* if the subsidiary had a branch or office, other than a representative office, in the United States.²⁰⁸ In its proposed section 225.4(g), however, the Board did not follow this limitation of asserted jurisdiction. To the contrary, the proposed section 225.4(g) offered only the narrowest possible scope for exemption.

The initial definition in the proposed regulation of which bank holding companies would be deemed "foreign" for its purposes gave unexceptional content to the statutory phrase of section 4(c)(9)—"the greater part of whose business is conducted outside the United States"²⁰⁹—by requiring that more than half of the company's "consolidated assets and revenues" must be "located and derived outside the United States."²¹⁰ Such companies might engage in *direct* activities of any kind outside the United States and engage in "direct activities in the United States that are incidental to its activities outside the United States."²¹¹ Thus, for judging direct activities, the

²⁰⁶ 12 U.S.C. § 1844(a) (1970).

²⁰⁷ 12 U.S.C. § 1841(d) (1970).

²⁰⁸ See Committee of Foreign-Owned Banks, Comments on the Proposed Regulations under Section 4(c)(9) of the Bank Holding Company Act 4 (Aug. 5, 1971) (paper in the files of the Board of Governors of the Federal Reserve System) [hereinafter cited as FOB Comments].

²⁰⁹ 12 U.S.C. § 1843(c)(9) (1970). See text at note 171 *supra* for the text of the Bevell amendment which, with the exception of the last clause, became § 4(c)(9).

²¹⁰ 36 Fed. Reg. 11,944 (1971); proposed 12 C.F.R. § 222.4(f)(1).

²¹¹ The "incidental" concept is used in § 4(c)(13), 12 U.S.C. § 1843(c)(13) (1970). Its origin is, without doubt, the Edge Act, 12 U.S.C. §§ 611 et seq. (1970), which limits the United States business of companies incorporated under it to that which "in the judgment of the Board of Governors of the Federal Reserve System, shall be incidental to its international or foreign business," 12 U.S.C. § 616 (1970). See text at notes 84-86 *supra*. The scope of the "incidental" concept can be very important to a foreign company which is engaged or wishes to engage in various kinds of business in the United States and is regulated under the Act because it has a United States "subsidiary" bank. Section 4 of the Act by its terms does not apply to "banking" activities so that direct branching activities of covered foreign banks need not be judged under this § 4(c)(9) standard (i.e., the branches may engage in purely "domestic" business). The Board made this point in its interpretation accompanying the final regulation under § 4(c)(9). See 12 C.F.R. § 225.124(b) (1973). But the major continental multinational banks with United States outlets are also engaged in the securities business on a multinational basis. Because the United States subsidiary banks are not member banks, § 20 of the Banking Act of 1933 (discussed in text at notes 55-57 *supra*) does not prevent their parent banks from participating in underwritings in the United States market. Presently,

Board borrowed the functional standard of section 4(c)(13) of the Act.

As for the stock holdings of foreign bank holding companies, the regulation proposed only to exempt by the general regulation²¹² holdings of twenty-five percent or greater in companies (wherever incorporated) that are "foreign" by reason of their not engaging, directly or indirectly, in *any* activities in the United States "except as shall be incidental to the international or foreign business of such company."²¹³ Thus, subsidiaries of foreign companies also were to be judged by the functional standard. No "domestic" business was to be allowed under the section 4(c)(9) *general* exemption. Holdings of less than twenty-five percent (*i.e.*, nonsubsidiaries) in foreign-incorporated companies were to be permitted under the general regulation if their United States business amounted to less than twenty percent of their consolidated assets and revenues *and* if they were not engaged at all "in the business of underwriting, selling or distributing securities in the United States."²¹⁴ By the latter provision the Board was reading Glass-Steagall into the Act, even though *direct* activities of the holding company, if "incidental," were not so qualified.

In effect, under the proposed implementation of Congress' new section 4(c)(9), not only would the specific approval of the Board have to be obtained for the holding or acquisition of any greater than a five percent voting interest in a United States corporation (unless the corporation only had "incidental" activities in the United States), but all such holdings in foreign corporations would have to be qualified by a special application procedure if more than twenty percent of their business derived from the United States.

Finally, ignoring the plea of the Committee of Foreign-Owned Banks to the Senate hearings that the different view abroad toward corporate disclosure be kept in mind, the regulation would have required a foreign company to report information, including a list of stockholders holding ten percent or more of any class of the company's voting shares, to the Board with respect to any acquisition, pursuant to the exemption, of shares in a company with "any business whatsoever in the United States."²¹⁵

In accordance with its usual practice, the Board invited com-

however, since the final regulation utilizes the same standard for direct activities, such underwritings will have to be "incidental" to the parent's activities outside the United States.

²¹² See note 202 *supra* as to application for *specific* exemption for other activities or investments that in the holding company's opinion meet the conditions for an exemption under § 4(c)(9).

²¹³ 36 Fed. Reg. 11,944 (1971); proposed 12 C.F.R. § 222.4(f)(1)(iii).

²¹⁴ 36 Fed. Reg. 11,944 (1971); proposed 12 C.F.R. § 222.4(f)(1)(iv).

²¹⁵ 36 Fed. Reg. 11,944 (1971); proposed 12 C.F.R. § 222.4(f)(3).

ments on the proposed regulation. The American Bar Association, in a letter dated July 23, 1971, expressed its apprehension that the restrictiveness of the proposed regulation "could cause foreign countries to impose similar restrictions on the foreign activities of the United States bank holding companies and banks in their foreign activities" and proposed that the regulation simply authorize foreign-based bank holding companies to engage in activities in the United States to the same extent that domestic bank holding companies were authorized to engage in foreign countries.²¹⁶

Except for the ABA's response, there was little comment from Americans. Understandably, the Committee of Foreign-Owned Banks commented, unhappily and in detail, that in the member banks' "considered judgment . . . the proposed regulations would result in a serious deterrent to new formations or acquisitions of chartered banks in the United States by foreign banks."²¹⁷ In particular, the Committee was unhappy about the reporting requirements. This was especially so because the proposed regulations could have been read to require reporting on acquisitions made in the course of investment banking activities. The twenty percent limitation on United States business for nonsubsidiary holdings in foreign corporations to qualify under the regulation was also highly troublesome. As the Committee's comments noted sagely, if unelegantly:

The fact that foreign corporations may derive 20% of their revenues from the United States is not a significant entry by a minority shareholding foreign bank into the United States economy. This will be increasingly true as international trade and business activities inevitably grow.²¹⁸

If the foreign bank holding company did not in fact control the foreign corporation, it was hard to see why the strictures of section 4 should be applied to the holding of stock in a foreign corporation with substantial United States business just because the foreign holding corporation happened also to hold a twenty-five percent or greater interest in a United States bank. The Committee realized that the Board in narrowly restricting the proposed general regula-

²¹⁶ The problem with this proposition is that at some point along the continuum of investment in the United States by foreign groups that also own a substantial interest in a United States bank, the United States policy of separation of banking and commerce must apply to foreign bank holding companies. To permit Credit Suisse to acquire both control of a major United States bank lending to the auto industry and a sizable interest in General Motors just because Swiss law would not prohibit a United States bank holding company from holding both in Switzerland is not a feasible proposition.

²¹⁷ FOB Comments, *supra* note 208, at 2.

²¹⁸ *Id.* at 8.

tion was giving itself a chance to look at the "public interest" on a case-by-case basis under section 4(c)(9), but nevertheless, the assertion of jurisdiction in the proposed regulation, the announcement, in effect, that minority shareholdings in foreign corporations would be scrutinized because of those corporations' United States contact, was troublesome. "Foreign banks need to know where they stand now in order to decide whether participation in United States banking through charter banks is worth subjecting their overseas investments to regulation in Washington."²¹⁹

The Committee proposed, instead, that if it were deemed necessary to control nonsubsidiary foreign holdings with United States contact, the "simple and realistic" test of the Registration Statement be used—*i.e.*, whether or not the foreign company had branches or operating offices in the United States. "If, and only if, they have branches or operating offices in the United States, a presumption of excessive involvement in the United States is raised"²²⁰ This presumption could then be rebutted by showing that over fifty percent of the company's business was outside the United States. The same rules should apply also to "subsidiary" holdings (*i.e.*, twenty-five percent or more of the voting shares) because "the exemption should be based on the degree of involvement in the United States, not on the nature of the relationship between two foreign corporations."²²¹

Finally, the Committee pointed out the harshness of the exclusion from the exemption for nonsubsidiary holdings of companies underwriting, selling or distributing securities in the United States. The Committee was perfectly willing to accept the Glass-Steagall restrictions as they exist in present law,²²² but protested the proposed subsection (iv)(C) of the regulation on the grounds that

²¹⁹ *Id.* at 5.

²²⁰ *Id.* at 13.

²²¹ *Id.* at 15. This argument, plausible on its face, misses the point that presumably the basic purpose of the Bank Holding Company Act is to prevent joint control of suppliers and users of credit. The other purpose is to prevent evasion of the restrictions on stockholding by banks (restrictions originating in the desire to protect depositors from bank speculation) by use of holding company corporate structure. The first purpose should apply equally to foreign holdings in the United States if these holdings have domestic economic impact. See note 216 *supra*. The second, perhaps, is a more parochial notion which we do not wish to insist upon as a condition of foreign bank entry. While we have an interest in protecting United States depositors in foreign-owned banks, presumably this can better be done through, for example, extension of the Federal Deposit Insurance Act to foreign branches than by controlling the holding companies' United States stock investments while ignoring their foreign financial structure. To the extent that this division of concept makes sense, so do the Board's distinctions between subsidiary and nonsubsidiary holdings.

²²² There was no attempt to argue in this brief that Glass-Steagall should not be given an extraterritorial application so as to prevent a holding company controlling a foreign securities company from acquiring control of a United States member bank; this restriction was accepted. See FOB Comments, *supra* note 208, at 17.

there is nothing in the legislative history of the Act, and certainly nothing in the language of Section 4(c)(9) itself, which indicates a Congressional concern to go beyond these existing statutory schemes and deny, as to holdings which existing law permits, the exemption from U.S. regulation which Section 4(c)(9) was designed to allow. . . .²²³

"If the 'laundry list' philosophy of prohibited activities, which has survived the legislative process in part in Section 4(c)(8), is to be applied without regard to extraterritoriality, Section 4(c)(9) loses its purposes."²²⁴ The Committee also pointed out that

given the fact that most of the U.S. activities of foreign investment bankers relate to foreign investment in American securities, impairment of access to the United States by any such firms might well have unintended adverse effects on the U.S. balance of payments.²²⁵

This threat, however, was minor. The result of the extraordinarily restrictive approach of the proposed regulation, unanticipated on the basis of Burns' testimony and the Registration Statement forms, would be "to constitute a formidable barrier to charter banking in the United States by foreign banks, which must be competitive in the fields of investment and merchant banking abroad."²²⁶ The complaint was fair: in a world with both a high degree of national regulation and necessity of flexibility for those connecting links in the world economy, the multinational corporations, unthought-through application of "national" treatment to foreign entry can erect as high a barrier to entry as discriminatory treatment. One hopes that the more egregious characteristics of the proposed regulation were a result of haste to get a proposal on the boards, and not the insularity of the regulator.

Section 225.4(g) of Regulation Y only appeared in final form on November 16, 1971,²²⁷ effective December 1, 1971. An accompanying interpretation²²⁸ (the Interpretation) expressed "the Board's views on several questions that arose during the course of its consideration of this matter [regulation of foreign bank holding companies]."²²⁹

²²³ Id.

²²⁴ Id.

²²⁵ Id. at 18.

²²⁶ Id. at 1.

²²⁷ 36 Fed. Reg. 21,807 (1971).

²²⁸ 12 C.F.R. § 225.124 (1973).

²²⁹ Id.

So far as direct activities (that is, activities conducted in the United States by the holding company itself) and foreign "subsidiary" activities (that is, activities in the United States conducted by foreign companies controlled by the holding company) of foreign bank holding companies in the United States were concerned, the Board stuck to its guns, but lowered their range somewhat. The functional section 4(c)(13) test of "incidentalness" was retained for direct United States activities of foreign bank holding companies, but a new definition of "activities" in the Interpretation in effect permits a foreign bank holding company to operate freely across United States boundaries so long as it does not open within the United States the type of facility that would qualify as an "establishment" under a typical tax treaty. Equally, foreign-incorporated²³⁰ subsidiary holdings remain subject to section 4 (that is, may only be retained or acquired if the subsidiary could be acquired by a domestic bank holding company or else is granted a specific exemption under section 4(c)(9) upon application to the Board) if the subsidiary has, directly or indirectly,²³¹ any "ac-

²³⁰ If the company in which the foreign bank holding company invests is incorporated in the United States, *any* stock holding over the 5% permissible minimum will not be exempted under § 225.4(g) if the company has other than "incidental" activities in the United States. (Foreign bank holding companies, of course, may take advantage of all the other exemptions to § 4 of the Act that are open to domestic bank holding companies.) However, this broad brush is alleviated in two ways: the Interpretation, 12 C.F.R. § 225.124 (1973), makes clear in subparagraph (d) that § 4 of the Act does not "apply to ownership or control of shares of stock in the capacity of an underwriter or dealer in securities" but only to "ownership or control . . . as an investment." 12 C.F.R. § 225.124(d) (1973). Thus a major concern of the Committee of Foreign-Owned Banks—the effect on the merchant banking business of the parent banks—was met by the Interpretation. Secondly, the final regulation added a specific exemption, with the consent of the Board, for investments by a foreign bank holding company in a company "principally engaged in the United States in financing or facilitating transactions in international or foreign commerce." 12 C.F.R. § 225.4(g)(2)(iv) (1973). The genesis and scope of this provision are mysterious. Since in addition to whatever special exemptions they may obtain under § 4(c)(9), foreign bank holding companies may take advantage of all the exemptions to § 4 of the Act that are open to domestic holding companies, this provision was *not* necessary to permit a foreign bank holding company with the consent of the Board to establish the equivalent of a so-called "Agreement Corporation" in which a national bank may invest to conduct international or foreign banking, see 12 U.S.C. § 601 (1970), or to take a minority position in an Edge Corporation, companies which are ordinarily thought of as financing or facilitating transactions in international or foreign commerce. Investment in Agreement or Edge Corporations would be permitted under § 4(c)(5), which authorizes bank holding companies to invest in shares eligible for investment by national banks. Possibly the secret is in the words "principally engaged," i.e., an Edge-type corporation is meant, but its peripheral activities will not be judged by the strict Regulation K standards. See note 97 *supra*. We will see later an attempt by a holding company to give content to the term "facilitating," and the 58th Annual Report of the Board suggests that the purpose of the provision was to cover New York investment companies owned by foreign interests. Board of Governors of the Federal Reserve System, 58th Annual Report (1971). See note 280 *infra*.

²³¹ A foreign subsidiary engages "indirectly" in activities in the United States by itself having a subsidiary (presumably as defined by the Act) that does so. 12 C.F.R. § 225.124(f) (1973). However, subparagraph (f) goes on to say that a "company is not 'indirectly' engaged

tivities" in the United States other than those which could qualify as "incidental to the international or foreign business of such company." (Neither section 225.4(g) itself nor the Interpretation, however, give any clue as to what kind of "activities" might so qualify.) However, the apparent scope of the jurisdictional assertion was considerably circumscribed by the Interpretation's careful elucidation of the content of the term "activities." Under the Interpretation, in order for a foreign subsidiary of a foreign bank holding company to be subjected to regulation under section 4 of the Bank Holding Company Act, its activities in the United States must entail considerably more contact with the United States than would be required, for example, for jurisdiction of a court in the United States under a typical "long arm" statute. For instance, a company, which from locations outside the United States engages in international trade with the United States or furnishes services, or finances goods or services in the United States, is not for the purpose of the Act engaged in "activities" in the United States. (Presumably, therefore, securities may be sold in the United States if an independent broker or agent is used.) A company is engaged in "activities," according to

in activities in the United States by reason of a noncontrolling interest in a company engaged in such activities." *Id.* The question left unanswered by the Interpretation is whether "noncontrolling" means lack of control in fact, or whether there is a presumption that any holding of 25% or more of the voting shares (the Act's definition of "subsidiary") is a controlling interest so that a foreign bank holding company must qualify any of its foreign "subsidiaries" that owns 25% or more of the voting stock of corporations engaged in "activities" in the United States because the foreign subsidiary is "indirectly" engaged in activities in the United States. The provisions of 12 C.F.R. § 225.124(e) (1973) would lead one to the conclusion that the Board meant "noncontrolling" in fact. Subparagraph (e) addresses the question of when a holding company owns shares "indirectly." The subparagraph does not use the term "subsidiary," but instead provides that a foreign bank holding company does not "indirectly" own voting shares by reason of a "noncontrolling" interest in the company owning or controlling such shares. However, subparagraph (e) goes on to provide that if such noncontrolling interest "is accompanied by other arrangements that, in the Board's judgment, result in control of such shares by the holding company," then the holding company indirectly owns or controls these shares, i.e., an apparent definition of actual control. In view of the purposes of the Act, see note 221 *supra*, this interpretation would make better sense than a mechanical application of a 25% rule. However, subparagraph (g) of the Interpretation suggests that when the question is one of whether or not a holding company may use the 12 C.F.R. § 225.4(g)(v) (1973) exemption (see below), the test is less than 25% of the voting shares and *not* whether or not the parent controls the company in fact. The technical reconciliation of the provisions would be as follows: BHC owns 26% of a corporation, *A*, incorporated and doing business in France, but does not in fact control *A*. *A* owns 25% of *B*, but does not control *B*, and *B* is engaged in activities in the United States. Under subparagraph (e) of the Interpretation BHC does not "indirectly" own the shares of *B* so as to have to find an exemption under § 4 for *those* shares. However, *A* is indirectly engaged in activities in the United States through its holding in *B* and since *A* is a subsidiary of BHC, BHC may only continue to hold its interest in *A* if (1) *B*'s United States activities are "incidental" to *A*'s international or foreign business (a coincidence if so, since *A* does not control *B*); (2) the Board, after application by BHC under 12 C.F.R. § 225.4(g)(3) (1973), grants BHC a § 4(c)(9) exemption for its holding of *A*; or (3) *A* by coincidence fits into some other category of exemption in § 4. If the Board did not mean to reach this result, its regulation and the Interpretation do not say so.

the Interpretation, only if it owns, leases, maintains, operates or controls a factory, a wholesale distributor or purchasing agency, a distribution center, a retail sales or service outlet, a network of franchised dealers, a financing agency, or a similar facility for the manufacture, distribution, purchasing, furnishing or financing of goods or services locally in the United States.

However, despite the delimitation of the term "activities," as previously illustrated,²³² a foreign company that acquires an interest in a United States bank sufficiently large enough to bring the Act into play may bring its noncontrolled (but twenty-five percent or more) foreign holdings within the ambit of section 4 because the company in which the bank holding company has invested itself owns twenty-five percent or more of a company with a United States establishment. Once again it might be argued that the Board was not intending by the rigor of section 225.4(g) to raise high barriers to foreign entry by the holding company route, but only to insure that each holding of twenty-five percent or more of the voting shares of a foreign company with direct or "indirect" United States activities is subjected to a special proceeding under section 225.4(g)(3).²³³ These special proceedings permit the Board to consider whether or not the nature of the United States activities and their relationship in fact to the holding company's banking business in the United States is consonant with the purposes of the Act. This would not appear to be the correct interpretation. In the course of examining the very few orders that the Board has made in section 4(c)(9) proceedings, it appears that the Board was articulating its tendency to take the position that a foreign company owning or acquiring a twenty-five percent interest in a domestic commercial bank must accept, as a condition precedent to its entry into United States banking, the application of the American concept of the necessary separation of commerce and banking to any purely domestic²³⁴ business which the foreign company may share in through other "subsidiary" holdings. The difficulty with this position, of course, is that, given the ad hoc structure of federal regulation of foreign bank entry, the imposition of the policy depends upon the form of the foreign entry, and by so doing discriminates, albeit conceivably with reason, between foreign banks (or their owners) and other types of foreign investors. In those states that

²³² See note 231 *supra*.

²³³ 12 C.F.R. § 225.4(g)(3) (1973).

²³⁴ What is meant here is "purely domestic" in the sense that the activities of the subsidiary or subsidiaries can neither be shown to be "incidental" to the foreign or international business of the company nor be qualified under the mysterious "principally engaged in financing or facilitating transactions in international or foreign commerce." See note 230 *supra*.

permit entry of foreign bank branches, a foreigner with a foreign bank charter could open a United States commercial banking facility and still invest freely in any other type of United States business, thus leaving the application of the principle to the vagaries of state law and policy.

The one situation in which the Board was willing to make a substantial change in its conception of regulation was that of the nonsubsidiary foreign company with United States business (section 225.4(g)(2)(v)). It will be recalled that under the proposed regulation, such a company (*i.e.*, a *foreign* company in which the holding company's interest is less than twenty-five percent of the voting shares) was to be exempt under the general regulation only if less than twenty percent of its consolidated assets and revenues were located and derived from within the United States. Presumably, accepting the Committee's pleas that such stringency was unwarranted in the case of minority holdings, the final regulation permits the foreign company in which a foreign bank holding company owns less than twenty-five percent of the voting shares to be exempt so long as less than *half* of its assets and revenues are located in and derive from the United States. However, as under the proposed regulation, the exemption is not available under the general regulation for a nonsubsidiary investment in a foreign company which, directly or indirectly, engages in the business of underwriting, selling or distributing securities in the United States.²³⁵ Thus, with respect to imposition of United States conceptions of banking structure upon foreign companies' foreign holdings with United States contacts, the Board in this portion of section 225.4(g) is schizophrenic. It recognizes that there is no reason to assert jurisdiction over the nonsubsidiary stockholdings of a foreign bank holding company if the companies are "foreign" in the sense that they are principally engaged in business outside the United States;²³⁶ but, at the same time, the Board evidently feels compelled to impose as a condition of United States bank investment the furthest possible extension of our particular policy of separation of commercial and investment banking, and to insist on application of this policy to foreign bank holding company foreign nonsubsidiary investments

²³⁵ 12 C.F.R. § 225.4(g)(2)(v)(c) (1973).

²³⁶ Indeed, it may be questioned why, if the amount of stock held is insufficient to give control over the business, it should matter whether the company is incorporated abroad or under United States law or how much of its business is derived from the United States. One can understand "source of income" as the basis for the imposition of taxation; the extension to jurisprudential notions of banking regulation becomes more metaphysical. Neither the Board's regulation nor its Interpretation offer any clue to the Board's thinking on this point and the only conclusion that can be drawn from the legislative history (or lack thereof) is that Congress did not mandate anything on the point.

with any securities business in the United States. The authority for this hierarchy of policies is invisible: why deriving income from the securities business in the United States (in a situation in which Glass-Steagall would not in *any* event apply because the foreign company with the United States securities business is not an "affiliate" of the United States bank held by the holding company) is worse than deriving income from commerce is not explained. Apart from the jurisprudential problem, the drafting of the provision leaves open the question whether "engage in the business" has the same content as "engage in activities" so that a company will not be barred from participating in a United States underwriting from abroad so long as it does not do so through a United States establishment (the Interpretation's delimitation of the term "activities") or whether the different phraseology mandates a different interpretation.

Thus, all in all, section 225.4(g), the general regulation implementing section 4(c)(9), is equivocal. The question is, which should predominate in regulation of foreign bank holding companies—the general notions of banking structure and regulation which are the genesis of the Bank Holding Company Act (the "policy of the Act"), or the need to work out special conditions for a special situation, foreign bank entry into the United States through local incorporation, so long as the special provisions do not permit conditions to arise which are clearly antithetical to the purposes of the Act? The Board did not receive any real guidance from Congress other than the open-ended quality of section 4(c)(9). The final form of section 225.4(g) would seem to indicate that at the time of its issuance the Board, while leaning toward strict imposition of the Act's standards, had not fully worked out its own policy on the question of the regulation of domestic activities of foreign bank holding companies.²³⁷

²³⁷ Whatever may have been the uncertainties of the Board concerning policy in Nov. 1971, by June 1972 the Board was stating that the "public interest" consisted of the full application of § 4 standards to foreign bank holding company United States incorporated holdings, foreign subsidiary holdings with United States activities and foreign holdings with a majority of United States source business. The issue came up in a peripheral fashion. At the time, 51% of the shares of Republic National Bank of New York were owned by Trade Development Bank of Geneva, the majority of which in turn was owned by a bank incorporated in Panama. The investment group ultimately behind the holdings desired to establish a new intermediate holding corporation, Trade Development Bank Holdings, S.A. of Luxembourg (Holdings), between the Panama and the Geneva companies, but in order to comply with the United States law, had to apply for approval for Holdings to become a bank holding company under § 2(a) of the Act. The Board approved the establishment of Holdings as a bank holding company on the curious grounds that approval would be in the public interest because, without the interposition, the Geneva bank would have *ten* years to dispose of its nonbanking activities in the United States (which, said the Board, without specifying their nature, would not be permissible under § 4(c)(9) and § 225.4(g)), and, with the new company

Next we turn to the Board's individual case decisions involving foreign banks and foreign bank holding companies to see if it has developed a clearer jurisprudence on a case-by-case basis. Interestingly, the situations which the Board has considered by a proceeding leading to an order have involved not only applications to qualify holdings under section 225.4(g)(3) (special proceedings under section 4(c)(9) of the Act), but have run the whole gamut of the special features of United States banking structure which were discussed in Part II, including the diffusion of power inherent in the dual banking system; geographical limitations posed by state boundaries; and the attempted separation in United States law between investment banking and commercial banking activities.

V. THE BOARD'S INDIVIDUAL DECISIONS INVOLVING HOLDINGS BY NONNATIONALS

A. *The Multistate Problems and Foreign Bank Establishment Under the Bank Holding Company Act*

The Board, in making determinations concerning foreign bank entry under the Bank Holding Company Act, has in the past several years been forced, whether or not it has given the policy determination explicit recognition, to make policy choices in a number of the troublesome areas discussed in Part II. The first recognition that a straightforward application of the shibboleths of American banking structure to foreign bank entry might not be so simple, came before the 1970 Amendments would raise the problem pointedly. The proceeding in question involved the multinational bank of British origin, Barclays Bank Limited (Limited). Limited operates internationally through Barclays Bank D.C.O. (D.C.O.), its international banking subsidiary, which in turn owns a subsidiary bank chartered under California law, Barclays Bank of California. Limited had, prior to the 1970 Amendments, become a registered bank holding company, and, indeed, a multistate bank holding company, under the Act because of its simultaneous indirect ownership of Barclays of California through D.C.O. and its ownership of a minority interest in Bank of London and South America, Limited, a "bank" within the Act (as section 2(c) of the Act then defined the term) because of its New York branch.²³⁸ D.C.O. was also doing business in New York, but did so through branches which had a relatively

injected, "applicant will be required to divest itself of these activities within two years from the date Applicant becomes a bank holding company." 58 Fed. Res. Bull. 589 (1972).

²³⁸ See note 166 supra. Chairman Burns noted in his testimony before the Senate committee hearings on the 1970 Amendments that the inclusion of situations such as this within the Act in 1966 was the result of an accidental omission in the redrafting of the § 2(c) definition of "bank" in the course of the 1966 Amendments.

restricted international business and which were unable to offer depositors federal deposit insurance.²³⁹ Management determined to reorganize D.C.O.'s branches into a separately chartered New York bank. This move, however, would constitute D.C.O., as well as Limited, a two-bank holding company and, therefore, subject to the Act. Under the Act, prior permission from the Board was required under section 3(a) before D.C.O. could acquire the shares of the proposed New York bank. The problem for the Board, however, was how, in view of section 3(d) of the Act,²⁴⁰ it could authorize D.C.O. to acquire a bank in New York when D.C.O. already held the shares of a bank in California. Section 3(d) was, and is, unequivocal:

. . . [N]o application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966 or the date on which such company became a bank holding company, whichever is later²⁴¹

In fact, of course, by virtue of being a foreign bank, D.C.O. was already operating in the two states; and the incorporation of the D.C.O. New York branches could be labeled a matter of mere form. Certainly for the Board to deny the application on the basis of section 3(d) would have been to elevate form over substance. To ground the Approval Order on a rejection of formalism, however, must have had two drawbacks for the Board staff charged with writing the Statement which was to accompany the Order. First, the Board in granting approvals under section 3 of the Act is required to balance factors weighing in favor of, and factors weighing against, permitting the particular transaction.²⁴² It was therefore necessary for Barclays to make the inconsistent argument, and for the Board to accept, that the D.C.O. branches in incorporated form would be more competitive than they would be as direct branches, since this finding of greater competition would be a factor weighing in favor of approval under the decision process required by section 3(c) of the Act. Secondly, it must have seemed undesirable to the Board to underline the fact that foreign banks, by their ability to branch

²³⁹ See text at note 37 *supra*.

²⁴⁰ See text at notes 69-70 *supra*.

²⁴¹ 12 U.S.C. § 1342(d) (1970).

²⁴² 12 U.S.C. § 1342(c) (1970).

directly, are regulated differently under the Act than are domestic banks and their holding companies. Instead, the Board produced a theory of approval of the Barclays transaction which neatly avoided facing head on whether section 3(d) should apply in the same way to foreign bank entry as to domestic bank expansion through holding company structure. Since in terms of total deposits the D.C.O. branches had larger operations than the California subsidiary, the grandparent bank, Limited, could be said to have the operations of its banking "subsidiaries" principally conducted in New York (the test of primary location under section 3(d)). Therefore, since Limited could be authorized to acquire additional banks in New York, Limited could be authorized to acquire the New York bank *indirectly* through D.C.O., and D.C.O. could acquire such a bank in its status as subsidiary.

Since the theory upon which D.C.O. would be authorized to acquire a bank in New York would be predicated upon its status as a subsidiary of Limited, the approval granted herein would continue in effect only for so long as D.C.O. retains that status.²⁴³

While an excellent, realistic decision for Barclays, the decision was not calculated to reassure other foreign banks that the conflict between section 3(d) and their needs as international banks to do business in the United States in more than one center of international trade as flexibly as possible would be resolved in their favor. Moreover, the decision warned Barclays that from here on in, except to the extent that it can utilize the legal routes across state lines developed by United States banks with national internal business, it will be treated, for better or worse, as a New York-based holding company. In view of this determination, the New York Long Island Trust Company decision²⁴⁴ and the recent approval for its rival, Lloyds Bank Limited, to acquire a major bank in Los Angeles, First Western Bank Trust Company,²⁴⁵ must have been particularly galling to Barclays.

The multistate question was also present, in effect, in the application by the Toronto-Dominion Bank, Toronto, Ontario, to become a bank holding company (under the 1970 Amendments) by acquisition of the stock of a bank to be incorporated in California. Toronto-Dominion was operating in New York through a combination of an agency and a trust company incorporated under the New York Banking Law. The Board, without raising the section 3(d)

²⁴³ 57 Fed. Res. Bull. 45, 46 (1971).

²⁴⁴ See text at notes 120-34 *supra*.

²⁴⁵ See text at notes 110-12 *supra*.

problem, merely noted of the trust company that it "does not accept demand deposits."²⁴⁶ Since the post-1970 definition of "bank" in section 2(c) of the Act requires a combination of both acceptance of demand deposits and the making of commercial loans, the Board was saying that the trust company in New York was not a "bank" and that therefore it did not have to consider the effect of section 3(d). However, this exclusion of the trust company from the status of "bank" did not relieve Toronto-Dominion from regulation of the trust company's business under the Act. On the contrary, it would appear that the business of the New York trust company will be regulated to a greater extent by the Federal Reserve Board than if its status under the Act were that of a "bank" held under section 3, assuming that Toronto-Dominion qualifies its trust company subsidiary under section 4(c)(8) of the Act and not under section 4(c)(9). In theory, at least, the Board under the Act regulates the holding company, and the regulation of the subsidiary banks is left up to the state or federal banking law and the concerned regulatory authority.²⁴⁷ But nonbank subsidiaries must fit into one or more of the permissible activities of section 4, and thus the parameters of their business are defined by the Act and regulations promulgated under it. The Board is currently struggling, in terms of working out the problems of multistate expansion for domestic banks, with the permissible activities of a trust company which is held as a nonbank subsidiary under section 4 and not as a "bank" under section 3. It is exactly the problem of multistate banking, the problem circumvented in the Toronto-Dominion decision, that is causing the struggle. The issue, without doubt, has come up because of the inexorable push of domestic banking over state lines: the possibilities inherent in Regulation Y, § 225.4(a)(4)²⁴⁸ have been only too visible to

²⁴⁶ 57 Fed. Res. Bull. 534 (1971).

²⁴⁷ Cf. Shay, *Bank Holding companies and the Fed: Whose Board?* 91 *Banking Law Journal* 332 (1974).

²⁴⁸ 12 C.F.R. § 225.4(a)(4) (1973). Section 4(c)(8) of the Act authorizes the Board to determine what activities of a bank holding company are "so closely related to banking or managing or controlling banks as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8) (Supp. II 1972). As noted previously, see note 141 *supra*, the Board in its Regulation Y came up with a list of activities that will be permitted under § 4(c)(8), among them § 225.4(a)(4):

Performing or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company (including activities of a fiduciary, agency, or custodian nature), in the manner authorized by State law so long as the institution does not both accept demand deposits and make commercial loans

12 C.F.R. § 225.4(a)(4) (1973), amended effective June 24, 1974, 39 Fed. Reg. 19774 (1974). Now trust companies under at least some state laws are flexible creatures; for example, under N.Y. Banking Law § 96 (McKinney 1971), a trust company has all the powers of a commercial bank except that it also has fiduciary powers. (Prior to the 1960 change in the New York Banking Law which permitted foreign banks to be able to open direct branches with bank deposit-taking and fiduciary powers, the Canadian banks opened agencies to do banking

domestic banks, and the Board has felt the necessity for refining *its* distinctions between a "bank" trust company and a "nonbank" trust company, going far beyond the simple test used in the Toronto-

business and established trust companies to do corporate trust work and coordinate with the agencies on lending. The Banking Department was willing to grant such charters on the informal understanding that while under N.Y. Banking Law § 96 (McKinney 1971), the trust companies would have the *power* to receive deposits from the public, they would not in fact do so.) Thus if a New Jersey bank holding company could persuade New York to grant it a charter, under § 225.4(a)(4) as initially promulgated it could in effect have a deposit-taking institution in New York performing corporate trust functions and a myriad of other traditional banking functions so long as it does not make "commercial loans." Or the new subsidiary can take the Canadian route and do everything except advertise to the public for deposits. This begins to look very close indeed to out-of-state branching and the Board began to realize it—and to struggle with the problem. First, in Jan. 1972 a majority of the Board approved the acquisition by the holding company of the Northern Trust Company of Chicago of a large trust company in Florida, Nortrust Corporation, Chicago, Illinois. 58 Fed. Res. Bull. 67 (1972). Governors Brimmer and Robertson of the Board pointed out in their dissenting statement:

Many banks operate trust departments. Because of this fact we have qualms about permitting the utilization of the Bank Holding Company Act to enable a holding company that controls a large Chicago trust company (that is also a bank) to buy up other trust companies (that technically are not banks under the Holding Company Act) in other sections of the country. These qualms are enhanced by the fact that trust companies often generate large amounts of uninvested trust funds, held awaiting investment, which could be funnelled to an unaffiliated bank in the Holding Company System located in distant cities.

Id. at 68. Next the Board as a whole decided it had better do something, and so proposed a revision of Regulation Y, § 225.4(a)(4), 38 Fed. Reg. 18,691 (1973), "to clarify the boundaries upon deposit-taking activities that are properly incidental to trust company activities which the Board has determined to be so closely related to banking." Id. The Board admitted its problem outright:

The definition of boundaries upon deposit-taking activities by trust company subsidiaries . . . is especially significant in the case of multi-state operations. . . . In some cases, trust companies are chartered as banks, but intend to limit their operations to trust activities and not to engage in commercial banking. The policy of section 3(d) would not apply to holding company subsidiaries of this type. The proposed amendment would delineate the scope of deposit-taking activities that could be engaged in by trust company subsidiaries consistent with nonbank status under the Bank Holding Company Act.

Id. The limitations must have been *too* limiting and engendered protest, for on Oct. 11, 1973 the Board tried again. See 38 Fed. Reg. 28,082 (1973). This time, it added back in some deposit-accepting functions (for agents or custodians) and limited what could be done with the funds, to sale of federal funds, call loans to securities dealers or money market investments.

The revised proposal would broaden the scope of permissible deposit-taking by trust company subsidiaries beyond the perimeters of the Board's original proposal, but narrow the scope of permissible, incidental lending activities. In doing so, it seeks to balance the desirable objectives of facilitating the achievement of greater efficiencies in the conduct of trust operations and providing additional incentives for increased competition for trust business on a nationwide scale on the one hand and, on the other, to remove the possibilities of indirect evasion of section 3(d) of the Bank Holding Company Act (12 U.S.C. 1842(d)) through the augmentation of the commercial lending capabilities of bank holding companies in states other than the state in which their principal banking subsidiaries operate. The revised proposal draws a rule that, based on the comments received, the Board believes would enable incidental deposit-taking consistent with the full range of conventional functions or activities of a trust company without risk of significant displacement of commercial bank checking account services.

Dominion order.²⁴⁹ For Toronto-Dominion, however, the result of establishing a commercial "bank" in San Francisco is that the activities of its New York trust company will have to be fit into the prescribed pattern of Regulation Y, § 225.4(a)(4) as amended,²⁵⁰ trust company rather than its own pattern as a foreign-owned trust company under New York law. It may well be that there is no problem, that the New York agency has been handling, and will continue to handle the commercial lending activities of Toronto-Dominion, and that the trust company's business already fits into the new Regulation Y, § 225.4(a)(4) pattern. If not, Toronto-Dominion has the option of conforming to the new section 4(a)(4) (presumably by transferring nonconforming lending or investment activities to its agency) or attempting to qualify the New York trust company by arguing that section 225.4(g) takes too narrow a view of the scope of section 4(c)(9) of the Act and that section 4(c)(9) can be interpreted to permit special situations for United States subsidiaries of foreign bank holding companies. Certainly to have the traditional way of doing business in the New York market by a major Canadian bank transformed by extrapolation of domestic policy from section 3(d) and the application of section 4(c)(8) would seem to be a backhanded form of regulation indeed.²⁵¹

Id. This Oct. 11, 1973 version was adopted on May 22, 1974, effective June 24, 1974. 39 Fed. Reg. 19774 (1974).

But what transcendental nonsense is this: this is the first time that the Board has suggested that the intention of § 3(d) was to confine commercial lending activities within geographic lines. The Board would seem almost to be creeping back a bit to its examiner's views in *Bancredit*. See text at note 73 *supra*. For our purposes, however, the series of proposed amendments illustrates the difficulties of applying a limitation such as § 3(d) to domestically-owned vehicles; the attempt to rationalize § 3(d) and foreign bank entry under the Bank Holding Company Act without better coordination of rules and function is equally fruitless.

²⁴⁹ See text at notes 245-47 *supra*.

²⁵⁰ See note 248 *supra*.

²⁵¹ Yet at least one major foreign bank holding company seems to have concluded that it is easier to behave as if one were a domestic holding company and apply for acquisition of a domestic subsidiary under § 4(c)(8) than to try to make any case for the application of § 4(c)(9) to domestic companies. Standard and Chartered Banking Group Limited, London, England, in the course of purchasing in London Mocatta & Goldsmid Ltd., one of London's major bullion dealers, proposed to acquire 30% of Mocatta Metals, Inc., a United States corporation with wholly-owned United States subsidiaries involved in buying and selling gold and silver bullion and silver coin, dealing in exchange and silver futures and arbitraging gold and silver in markets throughout the world. It would be hard to imagine a business more intimately linked to international markets, or, presumably, in the language of Regulation Y, § 225.4(g)(iv), "facilitating transactions in international or foreign commerce;" but rather than take a chance on the meaning of that language, Standard applied to the Board for prior permission to acquire the Mocatta shares under § 4(c)(8) of the Act and § 225.4(b)(2) of Regulation Y, asking for a finding that the Mocatta activities were so "closely related to banking or managing or controlling banks as to be a proper incident thereto." "Based on the facts of record," the Board so found, but required Standard to terminate Mocatta's dealing in platinum and palladium and other commodities. Interestingly, the Board noted in its statement the close relationship of the bullion market in New York to those of London and Zurich

B. *Problems of the Dual Banking System*

We have already discussed in considerable detail, in connection with the proposal by Barclays to acquire the Long Island Trust Company, the problems raised for the dual banking system in the United States by the concurrent jurisdiction of the Board and state banking authorities over bank holding company acquisitions. The Board was faced with a similar problem in connection with the proposal of the Royal Trust Company, Montreal, Canada, to acquire a base of operations in Florida. Through a finder, the Canadians located a national bank, Inter National Bank of Miami, for sale and applied to the Board for approval under section 3(a)(1) of the Act to become a bank holding company by acquisition of the shares of the phantom national bank into which Inter National was to be merged. Although the Florida authorities were apprised of the proposed acquisition,²⁵² they at first made no move, and did not submit any comment to the Board while the Royal application was pending. By order dated June 16, 1972,²⁵³ the Board approved Royal's application, noting mainly that since Royal "is not considered to be a likely potential entrant into the Dade County banking market other than by the proposed acquisition of [Inter National], consummation of that transaction is unlikely to have an adverse effect upon potential competition."²⁵⁴ The Board treated as affirmative factors Royal's proposal to establish a trust department in the Florida bank and "to improve the services offered by [Inter National] Bank's international department."²⁵⁵ No problem of possible conflict with Florida law was discussed, presumably since no one raised the issue.

By letter dated July 13, 1972, the Florida Banking Commissioner and the Florida Bankers Association asked the Board to reconsider the order granting Royal's application on the ground that the establishment of a trust department in a national bank located in Florida owned by a foreign trust company would be prohibited by

and that "[t]he activities of Mocatta would complement the international banking operations of Applicant, including especially its substantial banking operations in the gold-producing countries of Africa," but the decision, being under § 4(c)(8), presumably is a determination for *all* holding companies that bullion dealing is a proper activity and a suggestion to foreign bank holding companies that national treatment is the route to success. Fed. Res. Press Release, Sept. 27, 1973.

²⁵² The Florida Banking Commissioner advised Inter National Bank by letter dated April 18, 1972 that he would follow the advice of the Florida Attorney General that the newly enacted Fla. Stat. Ann. § 659.141 (Cum. Supp. 1973), purporting to prohibit a foreign (non-Florida) trust company from acquiring control over a trust company in Florida, would not apply to the acquisition of a national bank with trust powers. See Royal Trust Co., Order Denying Request for Reconsideration, 37 Fed. Reg. 18,414 (1972).

²⁵³ 58 Fed. Res. Bull. 665 (1972).

²⁵⁴ *Id.* at 666.

²⁵⁵ *Id.*

section 659.141 of the Florida Statutes.²⁵⁶ The Board did grant a temporary stay of its authorization to Royal to permit the parties to brief the issues. If the Board, as urged, were to find that section 659.141 of the Florida Statutes was intended to forbid a foreign trust company from acquiring control over a national bank operating a trust department, it would have been squarely faced with the issue of whether the deference to state law, apparently mandated by *Whitney National Bank v. Bank of New Orleans & Trust Co.*,²⁵⁷ should be applied in the case of foreign bank entry, or whether it could be said that the 1970 Amendments, in enacting a special provision for foreign bank holding companies, had indicated a congressional purpose to apply different considerations to multinational banking. In the case of the Royal application, the Board was able to duck the issue: it accepted the opinion of the Attorney General of Florida as to the scope of section 659.141 as the presently authoritative interpretation of the Florida law and stated in addition that "[t]he Board regards the advice of the Florida Attorney General as sound."²⁵⁸ However, the Board went further than the particular facts of the case required and announced its policy. Full deference is to be given to the dual banking system, and indeed, to state law in general; just as the Board will not approve a domestic bank holding company application in apparent conflict with the law of the state into which entry is sought,²⁵⁹ so the foreign bank holding company must square itself away with state law:

Finally, the Board notes that its Order of June 16, 1972 (as is the case with all approval orders under section 3 of the Bank Holding Company Act), is permissive in nature, in effect, removing only one obstacle to Royal's share acquisition—that created by section 3(a)(1) of the Bank Holding Company Act. That Order neither relieves Royal of duties deriving from other laws nor shields Royal from the consequences of violations of other laws. The courts of Florida appear to be open to Petitioners and may be a more appropriate forum than the Board for the interpretation and enforcement of Florida Statutes.²⁶⁰

Whatever justification there may be for such a policy in the case of acquisition of bank shares by a domestic holding company,

²⁵⁶ Fla. Stat. Ann. § 659.141 (Cum. Supp. 1973).

²⁵⁷ 379 U.S. 411 (1965).

²⁵⁸ Royal Trust Co., Order Denying Request for Reconsideration, 37 Fed. Reg. 18,414, 18,415 (1972).

²⁵⁹ See NCWB Corp., Order Conditionally Approving Proposal To Operate a Trust Company in South Carolina, 38 Fed. Reg. 7364 (1973).

²⁶⁰ 37 Fed. Reg. at 18,415.

the policy should at least be reexamined as applied to the international context. If foreign bank entry is to be freed from the complications of our federal system and the effectual state veto over such entry, Congress will specifically have to exercise its power over foreign commerce and provide explicitly for the arrangement of the respective spheres of jurisdiction between the federal and the state governments. The Board has exercised administrative self-restraint and has clearly indicated that it has no intention of interpreting the Bank Holding Company Act so as to reach such a result.

C. Permissible Domestic Subsidiaries: French-American Banking Corp. and Lloyds' Domestic Nonbank Companies

As we have seen,²⁶¹ the Board, in promulgating section 225.4(g), took a relatively narrow view of the new section 4(c)(9) of the Act. It saw that section as providing for the problems raised by the Act with respect to extraterritorial jurisdiction over foreign bank holding companies and their subsidiaries that are "foreign" in the sense of doing no business, or only a specified portion thereof, in the United States. Section 225.4(g), except for the authorization in subparagraph (2)(iv) to own or control, with the consent of the Board, the shares of any company principally engaged in "financing or facilitating transactions in international or foreign commerce,"²⁶² does not deal with foreign bank holding company participation in companies that, either by reason of place of incorporation or amount and type of United States business, are in effect classified by section 225.4(g) as domestic.²⁶³ The question then remained whether, with respect to such participation by foreign bank holding companies in domestic companies, the general standards for the separation of banking and commerce²⁶⁴ being worked out for domestic holding companies under section 4(c)(8) of the Act would be applied, or whether the Board would recognize, on a case-by-case basis, special claims by foreign bank holding companies for exemption with respect to their domestic holdings from section 4 of the Act by reason of the application of section 4(c)(9). The Board to date has considered particular cases of such holdings twice under section 4(c)(9).²⁶⁵

In 1919, a major French commercial bank (together with two United States banks) organized a company to act as a vehicle for

²⁶¹ See text at notes 229-34 *supra*.

²⁶² 12 C.F.R. § 225.4(g)(2)(iv) (1973).

²⁶³ See text at notes 212-13 *supra*.

²⁶⁴ See text at notes 139-41 *supra*.

²⁶⁵ As will be discussed in text at notes 313-22 *infra*, the Board has considered in detail the problem of participation in a securities firm, but the particular application of Glass-Steagall principles would seem to be a different question from the application of the separation between credit sources and credit buyers demanded by § 4.

providing credit to aid the post-war recovery of France. This was to be accomplished primarily by providing acceptance financing for international trade.²⁶⁶ The company was chartered under Article XII of the New York Banking Law,²⁶⁷ permitting the formation of, and regulating, so-called investment companies. Over the years, the company, French-American Banking Corporation (FABC), ultimately one hundred percent owned by Banque Nationale de Paris, the largest bank in France,²⁶⁸ expanded its business to offer a wide range of international financial services to banks, corporations and individuals.²⁶⁹ Under its charter, FABC can perform all of the commercial operations²⁷⁰ of a direct bank branch licensed under Article V of the New York Banking Law²⁷¹ except that, as an investment company, it is forbidden by section 509 of the Banking Law to "engage in the business of receiving deposits;" however, section 509 authorizes maintenance "for the account of others credit balances incidental to, or arising out of the exercise of its lawful powers"²⁷²

These credit balances gave the Board an initial problem when Banque Nationale de Paris decided to extend its United States business to California as well as New York and applied on June 23, 1971 for permission under section 3(a) of the Act to become a holding company by establishment of a banking subsidiary, French Bank of California, in San Francisco.²⁷³ If FABC were a "bank" as the Act defines that term, then Banque Nationale would have its principal banking operations in New York and could not under

²⁶⁶ Memorandum Concerning the Status of French-American Banking Corporation Under the Bank Holding Company Act, submitted by Cleary, Gottlieb, Steen & Hamilton in connection with Banque Nationale de Paris' Application pursuant to § 3(a) of the Bank Holding Company Act, on file at the Board of Governors of the Federal Reserve System [hereinafter cited as Memorandum].

²⁶⁷ N.Y. Banking Law art. XII (McKinney 1971).

²⁶⁸ Banque Nationale de Paris, Order Approving Formation of Bank Holding Company, 58 Fed. Res. Bull. 311 (1972) [hereinafter cited as Order].

²⁶⁹ Memorandum, *supra* note 266, at 1-3.

²⁷⁰ Under § 201-b of the New York Banking Law, a foreign branch may be authorized to exercise fiduciary powers in the state; the Investment Company Article does not provide for fiduciary powers for investment companies. However, it is probable that the New York investment companies do perform functions which could be classified as corporate trust activities. See the description of the business of French-American Capital Corporation, in text at notes 288-89 *infra*.

²⁷¹ N.Y. Banking Law art. V (McKinney 1971).

²⁷² N.Y. Banking Law § 509(4) (McKinney 1971).

²⁷³ The letter of application with respect to FABC, dated July 7, 1971, in the Board's files, notes that had it been possible for Banque Nationale to establish a direct branch in San Francisco, it would have done so. *Id.* at 5. The proposed business of the new subsidiary, a "wholesale bank specializing in the financing of international trade" (Order, *supra* note 268), would have permitted incorporation as an Edge Corporation if such stockholding were permissible to Banque Nationale.

section 3(d) of the Act establish a "bank" in San Francisco.²⁷⁴ The Board had previously ruled in 1956 (under the definition of "bank" as it existed at that time) that two other New York investment companies were not covered under the term,²⁷⁵ but had not yet ruled on the question under the definition as revised by the 1970 Amendments. Counsel for Banque Nationale briefed the issue extensively, including a letter from the then Superintendent of Banks of New York, stating that the New York State Banking Department's distinction between "credit balances" held by investment companies and New York agencies of foreign banks, and demand deposits held by commercial banks, is "both meaningful and administrable."²⁷⁶ The Board capitulated and ruled that the investment company should not be regarded as a "bank"

because it does not accept demand deposits within the meaning of section 2(c) of the Act.

In examining the legislative history of section 2(c), the Board is persuaded that Congress meant to include in the definition of "bank" only those institutions that offer to the public the general convenience of checking account facilities.²⁷⁷

Having determined that FABC was not a bank, it then became necessary for Banque Nationale to qualify FABC, and its equity investments, as permissible holdings of a bank holding company under section 4. Banque Nationale applied for permission to retain FABC and its holdings, not under the general provisions of section 4(c)(8), but under the specialized provisions of section 4(c)(9). The argument for FABC was that it qualifies under section 225.4(g)(2)(iv), the provision authorizing foreign bank holding companies, with Board consent, to own companies "principally engaged in the United States in financing or facilitating transactions in international or foreign commerce."²⁷⁸ The Board agreed with this

²⁷⁴ Note that since § 2(c) of the Act (the definition of "bank") specifically excludes from the definition of "bank" "any organization operating under . . . section 25(a) of the Federal Reserve Act," 12 U.S.C. § 1841(c) (1970), if Banque Nationale had been able to establish an Edge Corporation in San Francisco, the § 3(d) issue would not have been raised.

²⁷⁵ Memorandum, *supra* note 266, at 6.

²⁷⁶ *Id.*

²⁷⁷ Board of Governors, Fed. Res. Rul. (Nov. 8, 1971) (available upon request to the Board). The genesis of the problem of the out-of-state trust company subsidiary is clear. See note 248 *supra*. Note that incorporation of an investment company subsidiary might be an excellent conduit for non-New York holding companies to enter a specialized portion of the New York market. If the Superintendent of Banks permits such entry, the Board may be faced with the necessity of delimiting by regulation under § 4(c)(8) the scope of investment company subsidiary business as it has had to do for nondepository trust companies.

²⁷⁸ 12 C.F.R. § 225.4(g)(2)(iv) (1973).

contention;²⁷⁹ the exemption has been given some public content, and presumably will apply to investment companies owned by other foreign banks.²⁸⁰

FABC's business, according to Banque Nationale's Application for exemption on file at the Board, consists of involvement in the international exchange markets, including the international transfer of funds and domestic and foreign collections, and import and export financing. However, it also grants loans in other markets, including bankers' loans, medium-term loans, discounting receivables, granting and taking participations in loans to and from correspondent banks, and selling short-term notes of foreign and domestic entities to foreign and domestic clients.²⁸¹

The Application indicated that approximately seventy-six percent of FABC's business relates wholly to international and foreign commerce, and attempted to demonstrate that the majority of the remaining activities also are so connected. The contention was made that a loan to a United States company engaged in import-export activities for working capital purposes "finances and facilitates foreign commerce" (the section 225.4(g)(2)(iv) exemption). As we have seen, one of the questions that section 225.4(g) raises is the extent to which the Board is intending to import into regulation of foreign bank holding company subsidiaries concepts derived from the Edge Act.²⁸² So far as foreign activities of domestic bank hold-

²⁷⁹ Order of the Board, in Banque Nationale de Paris, Paris, France, 58 Fed. Res. Bull. 312-13 (1972) [hereinafter cited as Order of the Board].

²⁸⁰ The fact that the provision was drafted to cover New York investment companies appears only from the notation (in the Board's Annual Report) that Governors Mitchell and Maisel abstained from promulgation of § 225.4(g)(2)(iv) on the grounds that it would exempt investment companies having some purely domestic business not otherwise exempted. "In their view, the role of the specialized investment companies in the U.S. financial structure was not yet well enough defined to permit taking a position regarding the appropriateness of the exemption." Board of Governors of the Federal Reserve System, 58th Annual Report 95-96 (1971). The language of the regulation itself gives no hint of its purpose.

²⁸¹ The latter description of its business raised a question concerning the activities of FABC that counsel perhaps had not anticipated: could it be that FABC was acting as a commercial paper underwriter and dealer and thus might be an impermissible subsidiary in light of Glass-Steagall policy? The Application file at the Board contains a letter from counsel to a senior attorney of the Board differentiating the syndication and participation aspects of the lending activities conducted by FABC from typical underwriting and dealing in commercial paper; the gravamen of the argument is FABC's original lender function in the participations it sells. Apparently the argument was successful; the Board order does not even discuss the issue.

²⁸² This analysis of the jurisprudence of the Board was completed before the release by the Board on Jan. 9, 1974 of its decision under § 4(c)(9) concerning the subsidiaries of Lloyds Bank Limited with United States activities. Fed. Res. Press Release, Jan. 9, 1974. This decision, analyzed in the text at notes 303-12 *infra*, explicitly recognizes the parallelism of § 225.4(g)(2)(iii), Regulation K and the test under § 4(c)(13) of the Act and its implementing regulation, § 225.4(f) of Regulation Y. The text discusses some of the unresolved problems left by this approach.

ing companies are concerned, the Board in Regulation Y, section 225.4(f)²⁸³ has specifically recognized the parallel and has limited holdings to be permissible to domestic holding companies under section 4(c)(13) of the Act²⁸⁴ to those in which an Edge Corporation might invest. Moreover, section 225.4(g)(2)(iii), in setting the standard for domestic activities of companies in which shares are owned by foreign bank holding companies, uses the Edge Act "incidental" standard given content by Regulation K. But the exemption under section 225.4(g)(2)(iv) of domestic activities viewed as "financing and facilitating foreign commerce" is, at least so far as FABC is concerned, broader than the permissible scope of domestic activity granted to Edge Corporations under Regulation K. Under Regulation K, section 211.7,²⁸⁵ regulating Edge operations in the United States, the standard is "such limited business in the United States as is usual in financing international commerce," but section 211.7(d)(1) specifies that in financing import-export transactions, payments or costs financed may *not* include "expenses in the United States of an office or representative therein."²⁸⁶ Working capital loans of the kind made by FABC presumably do just that. Moreover, *all* the United States business of an Edge Corporation must be related to its foreign and international business. The decision approving the retention of FABC by Banque Nationale in effect says that "principally" as used in section 225.4(g)(2)(iv) means the great majority of the business, but exclusivity is not required.

To what extent the Board was aware in the FABC decision that it was, in effect, declaring the scope of the section 4(g)(2)(iv) exemption to be considerably broader than the range of United States activities allowed Edge Corporations is not clear;²⁸⁷ the implications for foreign bank entry, however, are clear. If the foreign bank desires multistate locations, the one place *not* to put a subsidiary constituting a "bank" for the purposes of section 3(d) of the Act is New York, where functionally equivalent entry can be achieved by branch, agency *or* specialized investment company without activating the Douglas Wall.

The decision, however, does not unbalance the competitive scale in favor of foreign bank holding companies; the option to enter the New York market through the investment company route is open to domestic bank holding companies, assuming that the New York Banking Department would be willing to charter such a

²⁸³ 12 C.F.R. § 225.4(f) (1973).

²⁸⁴ 12 U.S.C. § 1843(c)(13) (1970).

²⁸⁵ 12 C.F.R. § 211.7 (1973).

²⁸⁶ 12 C.F.R. § 211.7(d)(1) (1973).

²⁸⁷ See discussion of the Lloyds § 4(c)(9) decision in text at notes 303-12 *infra*.

subsidiary of a domestic holding company and the Board will qualify it under section 4(c)(8). Moreover, as the Board pointed out in its *Lloyds* decision involving section 4(c)(9), a domestic bank holding company can perform the domestic financial functions of an investment company such as FABC through other subsidiaries of the system.²⁸⁸ The apparently ineluctable expansion of the geographic scope of financial services is breaching the Douglas Wall for everyone.

In 1970 FABC had broadened the scope of its business by organizing a Delaware subsidiary, French-American Capital Corporation (FACC), to invest for its own account in the securities market, to make venture capital investments and temporary short-term investments, including participations in the syndication of foreign and domestic loans. FACC also proposed to provide investment advisory services for all types of investors, except open-end mutual funds, and to provide corporate financial services for foreign and domestic clients, including assistance in mergers and acquisitions. As part of its venture capital activities, FACC had acquired an equity position of fifteen percent in each of two American subsidiaries of French enterprises: Indumat Equipment Corporation, which sells and leases scaffolding systems, and Locafrance-U.S. Corporation, an equipment leasing concern.

FACC, unlike FABC, was clearly engaged principally in purely domestic activities and so had to be applied for under section 225.4(g)(3), the provision for a special determination that particular companies meet the section 4(c)(9) standards. The Board's discussion in the Order concerning Banque Nationale's domestic subsidiaries (the Order) is not illuminating: it simply states that in the Board's opinion FACC's investment activities "are consistent with the purposes of the Act and the public interest."²⁸⁹ Presumably, since a domestic bank holding company is free to acquire any shares it wishes provided such shares do not constitute more than five percent of the outstanding voting shares of the company in which the shares are acquired, the investment activities of FACC could not be faulted so long as the limits were observed. As for the proposed investment advisory and corporate financial services, the foreign bank holding company parent had no real grounds for a competitive advantage and was not given one: the retention of FACC was conditioned upon the limitation of the investment advisory services to those that would be permissible for a domestic bank holding company or its subsidiaries under section 225.4(a)(5) of Regulation Y.²⁹⁰

²⁸⁸ Fed. Res. Press Release, Jan. 9, 1974, at 5.

²⁸⁹ Order of the Board, *supra* note 279, at 313.

²⁹⁰ 12 C.F.R. § 225.4(a)(5) (1973).

The latter decision seems reasonable enough. There is nothing in the scanty legislative history to indicate that Congress meant the open-endedness of section 4(c)(9) to be carried so far as to provide special treatment for wholly-owned subsidiaries of foreign bank holding companies that are engaged in purely "domestic" business. Immediately, however, the possibilities in the loophole in the section 4(g)(2)(iv) exemption, the exception for companies principally engaged in facilitating international trade, the loophole pointed out by Governors Mitchell and Maisel,²⁹¹ becomes apparent. At the time of the decision with respect to FACC, the Board had not determined whether assistance in mergers and acquisitions was included within the investment advisory and corporate financial services permissible to a holding company nonbank company under section 225.4(a)(5) of Regulation Y. What, however, is to prevent the parent FABC from offering such advice to a foreign company concerning a domestic acquisition?²⁹² Surely such activity would fall within the scope of "facilitation of international commerce." Indeed, if the activity is within the powers of an investment company under New York law, why couldn't FABC perform the activity for domestic companies as a non-"principal" one? If the parent could do the business, why not the subsidiary? The Order does not answer this question.²⁹³ Presumably the denial to FACC of the right to offer domestic acquisition and merger advice is a way of saying that section 225.4(g)(2)(iv) does not permit companies qualified under it to do domestic business as a non-principal activity if such business would not qualify in any event under section 4(c)(8) (as would FABC's non-internationally related business). However the FACC decision still leaves open the issue as to the permissibility of nonfinancial business that could be shown to facilitate international commerce. The Order did not set out the Board's reasoning process, but the decision on FACC's holding of fifteen percent of Indumat Equipment Corporation would seem to suggest the answer to this question and the outer parameters of section 225.4(g)(2)(iv). The particular type of business of the particular entity in which the shares are held will be examined, and it is the *business* of the company invested in, and not the international banking rationale for the acquisition of the interest, that will determine whether or not the holding may be retained.

As a venture capital corporation, FACC supported the estab-

²⁹¹ See note 280 supra.

²⁹² N.Y. Banking Law art. XII (McKinney 1971), on investment companies, neither specifically authorizes nor specifically prohibits such consulting business for investment companies; the decision as to whether it would be within FABC's powers would presumably be a matter of administrative determination on the part of the Banking Department.

²⁹³ The order concerning Lloyds' subsidiaries, released Jan. 9, 1974, would give an answer, an answer bearing out the speculation in the text.

lishment of two United States subsidiaries of French corporations by taking fifteen percent equity participations in Locafrance-U.S. Corporation and Indumat Equipment Corporation. In the sense that the participations represented a form of financing of the parent investments in the United States, the Board could very well have ruled that such minority holdings in United States arms of foreign parents merely represented another form of "facilitating international commerce" (section 225.4(g)(2)(iv)) and could have permitted the holdings without considering the particular type of business conducted and its permissibility under section 4(c)(8) of the Act.²⁹⁴ Or it could have accepted an argument, made by counsel for Banque Nationale, that since under section 225.4(g)(2)(v)²⁹⁵ the holding company could have taken a less-than-controlling interest in the parent corporations (because, despite the United States business of the subsidiaries, more than half the parents' assets and revenues were located and derived from outside the United States), there is no reason to proscribe a noncontrolling interest in the United States subsidiaries.

The Board did not accept either argument. FABC itself could qualify under section 225.4(g)(2)(iv) because its business consists *primarily* of international financing. FACC would, in any event, be permissible under section 4(c)(8) of the Act. The Board authorized the fifteen percent holding in Locafrance-U.S. Corporation because Locafrance engages in equipment leasing, an activity permitted under section 4(c)(8), as developed by Regulation Y, section 225.4(a)(6). However, this authorization for the fifteen percent equity interest in Locafrance has a condition: the investment may be retained only so long as Locafrance "confines its activities to leasing of personal property and equipment in accordance with § 225.4(a)(6) of Regulation Y."²⁹⁶ Thus, because a minor portion of the capital for a United States subsidiary of a French corporation was raised from a foreign bank holding company in the legal form of an equity

²⁹⁴ The process of distinguishing between portfolio investments acquired, in effect, as part of international financing and the acquisition of an interest in a company for the purpose of engaging in that type of business is not new to the Board. Under the Edge Act and Regulation K, Edge Corporations may not invest in more than 25% of the voting shares of a foreign corporation without specific Board consent and the Board has taken the position that nonportfolio type acquisitions may only be made in *financial* type companies. If 25% or less of the voting stock is obtained (and the amount invested does not exceed \$500,000), the investment is assumed to be a financing one and the particular type of business of the investee is disregarded. See Regulation K, 12 C.F.R. § 211.8(a) (1973). The Board has also ruled that Edge Corporations, in the course of acquisition of bond issues of foreign affiliates of United States corporations, may acquire rights to acquire shares of the parent, even though an actual investment in the United States parent would not be permissible. See 55 Fed. Res. Bull. 442 (1969); 12 C.F.R. § 211.104 (1973).

²⁹⁵ See text at note 235 *supra*.

²⁹⁶ Order of the Board, *supra* note 279, at 313.

participation,²⁹⁷ the United States arm of the French company must now tailor its lending procedures to meet the Board's requirements for the activities of a domestic bank holding company leasing subsidiary. The Board in connection with an application by Bank America Corporation to engage in a type of short-term leasing not meeting the present requirements of Regulation Y, section 225.4(a)(6), has explained its refusal to authorize the business partially on the ground that the financial risks of recovery of the investment in the leased property were sufficiently great as to outweigh any benefits to the public of entrance into the business by Bank America Corporation.²⁹⁸ Whatever the Board's responsibility to protect the financial stability of domestic bank holding companies, the same obligation need not be assumed vis-à-vis the economic health of a fifteen percent investment of a foreign bank holding company. Nor can Locafrance's competitive strength be such that it can be argued that its leasing business must be circumscribed. The decision seems a purely formalistic one, not required by any policy set by Congress in the Act.

As for the Indumat investment, it could not be qualified at all. The Board said simply:

FACC's investment in Indumat Equipment Corporation is an investment that would not be permissible to a domestic bank holding company, since Indumat is engaged in the business of selling goods in the United States. The Board believes that such an investment is inappropriate for a foreign bank holding company, and no sound reasons have been advanced by Applicant in support of a contrary conclusion.²⁹⁹

The Board, then, would seem to have settled on an administratively simple content for the concept of "appropriateness" to foreign bank holding companies of minority interests in United States companies:

²⁹⁷ Possibly the result could be avoided by giving the financing corporation a convertible debt obligation or debt accompanied by warrants. Regulation Y provides in 12 C.F.R. § 225.2(b)(5) (1970) that the owner of securities "immediately convertible at the option of the holder . . . into voting securities presumably owns or controls the voting securities," but if the convertible feature or warrants are of a type normally utilized in connection with a financing investment, the rights should not be treated as ownership of the underlying shares. The Board has permitted Edge Corporations to acquire rights so long as the rights are only exercised, if exercise is permissible at all, in accordance with Regulation K, 12 C.F.R. § 211.104 (1973). Any other result would be purely formalistic as it would unnecessarily require the financing to flow through the parent.

²⁹⁸ Description of Board letter dated June 29, 1972, in Blaine, *Federal Regulation of Bank Holding Companies* 6-12 (1973).

²⁹⁹ Order of the Board, *supra* note 279, at 313.

would the investment be permissible for a domestic bank holding company?

As for FACC itself, the Board's decision also makes clear that it must confine itself to activities permissible to a domestic bank holding company subsidiary: it must limit its corporate financial services "to the kind of services authorized by § 225.4(a)(5) of Regulation Y."³⁰⁰ Since FACC is a wholly-owned subsidiary of a wholly-owned subsidiary of the foreign bank holding company, the decision seems in accordance with the congressional purpose to insure that in their *own* activities here, the foreign companies submit to United States views of the appropriate range of activities for deposit-taking entities and their affiliates. It does not follow from this point that noncontrolling interests acquired, as a form of financing, in the domestic arms of foreign companies should also be run through the same grid. Even as an administrative matter, it would be possible to permit FACC, if necessary, with prior Board consent, to acquire greater than five percent equity interests (but less than control) in domestic subsidiaries of Banque Nationale's foreign clients regardless of the type of business engaged in. In short, the regulatory scheme could, without violating the purposes of the Act, permit FACC to be a "French Edge Corporation" financing international business in the United States.

The formalistic decisions as to Locafrance and Indumat seem all the more curious in view of the scope given to FABC. If all of FABC's business were shown to be incidental to its foreign and international business, it could have been qualified as permissible under section 4(c)(5) of the Act, the exemption from section 4 of the Act for corporations in which a national bank is permitted to invest.³⁰¹ By authorizing FABC under section 4(c)(9) of the Act, as interpreted by section 225.4(g)(2)(iv), the Board has only required FABC to be *principally* engaged in foreign or international business. In a backhanded way, the Board has utilized section 4(c)(9) to permit foreign bank holding companies to own state-incorporated equivalents of Edge Corporations, but without the highly technical distinctions imposed by Regulation K on domestic activities of Edge

³⁰⁰ Id. at 313. 12 C.F.R. § 225.4(a)(5) (1973) authorizes "acting as investment or financial advisor."

³⁰¹ 12 U.S.C. § 1843(c)(5) (1970). National banks are specifically authorized by 12 U.S.C. § 601 (Supp. II 1972) to invest in the stock of "corporations chartered or incorporated under the laws of the United States or of any state thereof, and principally engaged in international or foreign banking" The statute only requires such so-called "agreement corporations" (so named for the agreement which the corporation must enter into with the Board of Governors before a national bank may invest in its shares) to be "principally engaged;" Regulation K, however, restricts the operations of agreement corporations to those permissible to an Edge Corporation engaged in banking. Regulation K, 12 C.F.R. § 211.10 (1973).

and Agreement Corporations. If such flexibility can be granted to the banking subsidiary, why not to the venture capital subsidiary in its business of financing foreign investment in the United States?

The proposed acquisition, approved by the Board in December 1973,³⁰² by Lloyds Bank Limited of First Western Bank and Trust Company, Los Angeles raised for consideration by the Board, under section 4 of the Act, Lloyds' holdings of companies with activities in the United States.³⁰³ Unlike Banque Nationale de Paris, Lloyds' holdings involve only domestic "subsidiaries," five nonbank United States-incorporated companies, one wholly-owned and the others forty-six percent (approximately) owned. These holdings are clearly analogous to direct activities by the holding company in the United States. Thus in the Lloyds case, the Board was faced squarely with choosing whether to give separate content to section 4(c)(9), to permit a foreign bank holding company in an appropriate case to be treated differently in the United States from a domestic holding company, or to read domestic policy back into section 225.4(g) so as to insure under it only national treatment. Recall that in the legislative history of the one-bank holding company legislation two strands of thought on foreign bank holding company treatment appeared. One strand, appearing in the language of the original Bevill amendment that ultimately became section 4(c)(9), "in the public interest by . . . facilitating the foreign commerce of the United States," is concerned with reciprocity, with reduction of barriers to entry so that barriers abroad for our banks will not be raised. The other strand is inward-focusing and reflects the concern that the foreign entrants be subjected to the same requirements as domestic holding companies so that the foreigners do not have a "competitive" advantage. Although the Lloyds' subsidiaries, given the nature of their business, could be seen as presenting a highly appropriate situation for the former approach, the Board chose to direct its analysis totally along the second strand. The *Lloyds* decision confirms the approach of the Board perceived in the Banque Nationale decision.

The five subsidiaries of Lloyds Bank Limited are Balfour, Williamson, Inc. (BW), a New York company financing international trade; Export Credit and Marketing Corporation (ECMC), a company utilized to hold the shares of the remaining three; Export Credit Corporation (ECC), also financing international trade; and Drake America Corporation (Drake) and Drake America Corpora-

³⁰² Fed. Res. Press Release, Dec. 10, 1973.

³⁰³ The Board announced its decision on these holdings in a Fed. Res. Press Release dated Jan. 9, 1974 [hereinafter cited as Lloyds' § 4(c)(9) Release].

tion (P.R.) (Drake P.R.), the latter two described as "export management compan[ies]." ³⁰⁴

Apparently taking the language of section 225.4(g) of Regulation Y at face value, Lloyds applied to qualify these holdings under the one general provision of section 225.4(g) seemingly applicable to domestic subsidiaries, ³⁰⁵ subsection (g)(2)(iv), authorizing ownership, with Board consent, of companies "principally engaged in the United States in financing or facilitating transactions in international or foreign commerce."

The Board evidently was regretting its inclusion of this provision in the regulation. The Lloyds' section 4(c)(9) Release does not even discuss its apparent application to BW and ECC, both clearly principally engaged in financing international commerce. Instead, the Board in the Release elaborates on section 225.4(g)(2)(iii), ³⁰⁶ a provision one would have thought intended to be applied to foreign subsidiaries with United States activities. The Board points out the parallelism of the language of this provision to the Edge Act, Regulation K and section 4(c)(13) of the Act. The Release states:

In the Board's judgment, the activities of BW, except as noted below, and of ECC are consistent with the scope of activities permitted to Edge Act corporations under § 211.7(d)(i)(ii) of Regulation K and domestic bank holding companies under § 4(c)(13) of the Bank Holding Company Act and § 225.4(f)(1) of Regulation Y. ³⁰⁷

Therefore, the Board concludes, Lloyds' investment in the two companies may be retained as "consistent with the purposes of the Act and in the public interest." The words "except as noted below" are significant: the Board required BW, as a condition of its retention by Lloyds, to cease engaging in the activity of arranging directly the shipment of goods from the United States and to cease operating three small retail stores it had acquired in working out a defaulted loan obligation to it. There was no evidence that these activities constituted any significant part of BW's business, nor any evidence that performance of these activities as a minor part of BW's principal business of financing international trade was "sub-

³⁰⁴ Id. at 3.

³⁰⁵ See text at notes 262-63 *supra*. The Board in its Order does not mention that Lloyds applied to qualify five holdings under § 225.4(g)(2)(iv), but see Application of Lloyds Bank Limited, Form F.R. Y-1, filed Aug. 22, 1973, at 35, on file at the Board [hereinafter cited as Application].

³⁰⁶ 12 C.F.R. § 225.4(g)(2)(iii) (1973), which provides that a foreign bank holding company "may [o]wn or control voting shares of any company that is not engaged, directly or indirectly, in any activities in the United States except as shall be incidental to the international or foreign business of such company."

³⁰⁷ Lloyds' § 4(c)(9) Release, *supra* note 303, at 4-5.

stantially at variance with the purposes of the Act." The standard rather is the other way around; the decision on BW is a holding that the foreign bank holding company may only qualify a holding as a domestic subsidiary if *all* of its activities would be permissible to a domestic bank holding company. This, of course, is to say that for domestic subsidiaries, at least, section 225.4(g)(2)(iii) has no independent meaning. If all it means is that a domestic company in international trade may be retained by a foreign bank holding company if the business could be done by an Edge or Agreement Corporation, then section 4(c)(9) as interpreted by the Board has added nothing to section 4(c)(5) of the Act.³⁰⁸ But this is just what the Board means; it makes its rationale explicit: "Performance of these activities [those required to cease] would give Lloyds Bank a competitive advantage over domestic bank holding companies."³⁰⁹ The Board, however, cites no empiric evidence that Lloyds would be given any specific advantage in any specific market. If this interpretation is what Congress meant by its addition of section 4(c)(9) to the Act, Congress could have said so more clearly.

As for Drake and Drake P.R., since the Board apparently felt that their activities could not be categorized as *United States* business that would be permissible to an Edge Corporation under Regulation K,³¹⁰ the Board was faced with saying why they could not be

³⁰⁸ See note 230 supra.

³⁰⁹ Lloyds' § 4(c)(9) Release, supra note 303, at 5.

³¹⁰ The Board's description of Drake's business as that of an export management company, "functioning, in effect, as a domestic manufacturer's export department," is the self-characterization utilized in the Application, supra note 305, and a supplementary letter from counsel for Lloyds to the Board dated Oct. 23, 1973 (the Letter). Although Lloyds argued that, in its foreign distribution functions, Drake was not engaged in the general business of selling goods in the United States, but rather was acting as a conduit for financing purposes, from the description of Drake's functioning given in the Application and Letter, the Board concluded that Drake and Drake P.R. (with identical activities in Puerto Rico)

are investments that would not be permissible for a domestic bank holding company under § 4(c)(8) of the Act since Drake and Drake P.R. engage in commercial nonfinancial activities, which are not so closely related to banking or managing or controlling banks as to be a proper incident thereto.

Lloyds' § 4(c)(9) Release, supra note 303, at 6. Therefore, the only avenue left for qualification was that which Lloyds itself had chosen, § 225.4(g)(2)(iv). However, to anyone familiar with the method of operation of the factoring business (permissible to domestic bank holding companies under Regulation Y, § 225.4(a)(1)), the characterization of Drake's relationship with foreign buyers as "commercial nonfinancial activities" seems anomalous. In effect, domestic factors operate (and describe themselves) as the billing departments of the "rag trade." They take the credit risk that the buyers will not pay; they do not take the market risk as *seller* even though their security interest in the goods may give them nominal "title." Drake's operations sound similar, except that Drake sets up and evaluates distribution networks and obtains the orders from the foreign buyers. (Factors do not handle the selling, although they preevaluate the credit of buyers before agreeing to factor a buyer's invoices.) If one were concerned with United States located activities, this distinction might be sufficient to draw the line here between "financing" and "commerce;" however, since the actual activities described as "commercial" all take place abroad, the line seems harsh. The decision is even

qualified as "facilitating transactions in international or foreign commerce" under section 225.4(g)(2)(iv). The Board explains:

The term 'facilitating' is intended by the Board to cover international or foreign *banking* activities, such as those carried on by New York 'investment companies' and is not intended to include nonbanking activities such as the export management activities of Drake or Drake P.R. In the Board's judgment, Drake and Drake P.R. are essentially engaged within the United States in a domestic commercial business even though that business concerns international transactions.³¹¹

The exemption, therefore, for these companies from section 4 of the Act was denied. If section 225.4(g)(2)(iv) has any independent content left, apart from business that could in any event be qualified under section 4(c)(8), it is in that word "principally," and as noted, the Board has not yet clarified the extent to which an investment company qualified under section 225.4(g)(2)(iv) may have minor nonconforming business.³¹² Given the approach of the *Lloyds* decision, it may be assumed that the Board's intention is to insist that *any* domestic business qualified under section 4(c)(9) be permissible under section 4(c)(8). The *Lloyds* decision is without doubt comforting to Lloyds' domestic competitors and, in view of the extent of Lloyds' participation in the purely domestic banking market by acquisition of First Western, may be a fair imposition of domestic standards on that entry, but one wishes that the Board's analysis had demonstrated more precision.

D. *Banco di Roma Meets Glass-Steagall*

The Board decision on Banque Nationale's United States subsidiaries was released on February 7, 1972. Had counsel for Banco di Roma read Banque Nationale's application folder at the Board, and seen the Board's concern as to the nature of FABC's sale of participations, considerable effort might perhaps have been saved. Banco di Roma, the third largest commercial bank in Italy, in 1972 had an agency office in San Francisco and representative offices in New York and Chicago. The San Francisco and Chicago offices

more curious in that the Board in 1967 authorized an Edge Corporation to hold shares in a company acting for United States companies as an export sales manager, holding that the company's United States activities were "incidental to its international or foreign business." 53 Fed. Res. Bull. 752 (1967); 12 C.F.R. §. 211.103 (1973). Thus the Board had a direct precedent for authorizing Drake under its own new interpretation of § 225.4(g)(2)(iii), but neither Lloyds nor the Board referred to the earlier decision.

³¹¹ Lloyds' § 4(c)(9) Release, *supra* note 303, at 6-7.

³¹² See text at notes 292-94 *supra*.

were opened in 1970. As part of its world-wide loose alliance with two other major Common Market banks, Credit Lyonnais of France and Commerzbank of Germany, Banco di Roma in April 1971 purchased a one-third interest in a New York securities corporation chartered in 1968 by Credit Lyonnais to "facilitate investments in [the United States] by the European clients of the [bank]." ³¹³ EuroPartners Securities Corp., as the Credit Lyonnais subsidiary was renamed after its shares were sold to the other two banks, although receiving most of its business through its parent banks or their clients, operates a full-scale securities business, with general brokerage, underwriting, investment banking and investment advisory services. Even without looking at Banque Nationale's difficulties, Banco di Roma could have guessed from the particular limitations in section 225.4(g) on the permissibility of investments in foreign companies engaging directly or indirectly in underwriting, selling or distributing securities in the United States ³¹⁴ what the Board's attitude towards a *domestic* subsidiary of a foreign bank holding company so engaged would be. Nevertheless, Banco di Roma persevered in its approach to the Board under the Act.

Unable at that time to open a branch in Chicago, ³¹⁵ Banco di Roma on May 1, 1972 obtained a charter from the Illinois banking authorities for an Illinois subsidiary bank. Although the charter presumably was not limited, the intention was to utilize the new bank as an international banking arm of Banco di Roma, to specialize in international trade with Europe originating in the Chicago area. ³¹⁶ Utilization of the separate corporate form brought the new facility and Banco di Roma under the Act and on May 25, 1972, Banco filed with the Board its application for permission to become a bank holding company by the acquisition of the new bank's stock pursuant to section 3(a)(1), together with its letter applying under section 4(c)(9) for permission to retain its one-third interest in EuroPartners Securities Corp. As an affiliated company engaged in the securities business, EuroPartners would seem *prima facie* impermissible under the Glass-Steagall mythology. ³¹⁷

Banco's chief argument was that Glass-Steagall principles in this situation would be purely formalistic: a branch was what they

³¹³ Letter from Banco di Roma to Board of Governors of the Federal Reserve System applying under § 4(c)(9) for approval to retain its interest in EuroPartners Securities Corp., May 25, 1972, on file at the Board [hereinafter cited as Letter].

³¹⁴ See text at notes 235-36 *supra*.

³¹⁵ See text at notes 38-39 *supra*.

³¹⁶ Application of Banco di Roma to the Board of Governors of the Federal Reserve System, for permission under § 3(a)(1), May 25, 1972, on file at the Board; Banco di Roma S.P.A., Order Approving Formation of a Bank Holding Company, 58 Fed. Res. Bull. 930 (1972).

³¹⁷ See text at notes 44-63 *supra*.

wanted and what, absent the unfortunate nature of Illinois law, they would have had. The branch, of course, would not be subject to federal law and so no issue as to the permissibility of the EuroPartners' holding would have arisen. Banco also argued, rather lamely, that the securities business of EuroPartners was in the main incidental to the international bank business of the parent banks: "These conditions are quite different from those envisioned when the complete divorce between banking and securities business was decreed by the Glass-Steagall Act, and seem to justify per se the exemption requested under § 4(c)(9) of the Act."³¹⁸ To sweeten the issue for the Board, Banco di Roma gave a list of assurances of separation between the business of EuroPartners and Banco di Roma (Chicago).

However, Banco's efforts were all to no avail. The Board approved the acquisition of Banco di Roma (Chicago) and denied the application to retain the interest in EuroPartners. The same idea that informed the Banque Nationale decisions operated here: American activities must be judged by American standards. "Banco di Roma's investment in EuroPartners is an investment that would not be permissible to a domestic bank holding company."³¹⁹ There was a nod in the direction of the importance of Glass-Steagall policy, as the Board noted that it was not persuaded that the public benefits alleged for the affiliation (beneficial impact on the balance of payments) would outweigh the "possible adverse effects with which Congress was concerned in the enactment of the Glass-Steagall Act." The real rationale follows:

³¹⁸ Letter, *supra* note 313. Despite the mention of "conditions," Banco apparently was not attempting to argue that Glass-Steagall criteria should not be applied to a company otherwise exempt under Regulation Y, 12 C.F.R. § 225.4(g)(2)(iv) (1973), as facilitating international commerce, but rather that, under 12 C.F.R. § 225.4(g)(3) (1973), this kind of business is the kind of business that should be, under the standards of § 4(c)(9) (in the public interest and not substantially at variance with the purposes of the Act), permitted to a foreign bank holding company engaged in world-wide international banking and securities activities. The Board in its denial order took the trouble in a footnote, 37 Fed. Reg. 21,012 n.1 (1972), to intimate that underwriting for United States customers, although only a small part (90% of 15%) of a business that was demonstrably (utilizing the 70% test accepted for French-American Banking Corporation) principally facilitating international commerce (73% of EuroPartners' gross income was derived from foreign sources), would disqualify a company for a § 225.4(g)(2)(iv) exemption, as well as a § 225.4(g)(2)(iii) exemption (activities within the United States incidental to those outside). Thus the *Banco di Roma* decision makes an addition to the fleshing out of the scope of § 225.4(g)(2)(iv). The Board added: "The Board expresses no opinion on the question whether a company engaged in the United States exclusively in brokerage business for primarily foreign customers could qualify for exemption under either of these sections," thus throwing up the question of whether brokerage will fall within "facilitating international commerce." Order Disapproving Retention of Investment in EuroPartners Securities Corp., 37 Fed. Reg. 21,012 n.1 (1972).

³¹⁹ 37 Fed. Reg. 21,012 (1972).

An affiliation with a securities company would give a foreign bank holding company an unfair competitive advantage over a domestic bank holding company in that a foreign bank holding company would be able to offer its customers an alternative means of obtaining financing to [*sic*] credit facilities, namely, underwriting facilities.³²⁰

To the extent that the foreign bank holding company is genuinely analogous to a domestic bank holding company, that is, it owns or controls an entity doing a full-scale commercial banking business in the United States, the decision seems unassailable. The problem arises with the nature of the business that Banco di Roma proposed to do in Chicago. There was no suggestion that Banco di Roma (Chicago) was interested in attracting local deposits. The description of its business sounds identical to a New York bank's Edge subsidiary in Chicago. Had Banco di Roma been able to incorporate an Edge Corporation in Chicago, or the equivalent of a New York investment company, the issue of affiliation with a securities company would not have arisen.³²¹ Yet in each case, Banco would have the same competitive advantage cited by the Board. The competitive advantage would, however, have its price—no access to demand deposits subject to check. The line is being drawn for the question of multistate banking;³²² the same line could serve as well for the application of Glass-Steagall. The Board could conceivably have asked Banco di Roma if it would make the exchange and could have authorized continued holding of the interest in EuroPartners on the condition that Banco di Roma (Chicago) limit its demand deposits to that type of credit balances held by French-American Banking Corporation. Instead the decision was made on a simple (not to say simplistic) basis, one possibly required by the present structure (or lack thereof) of treatment of foreign bank entry. Reasonably enough, perhaps tiring of such left-handed regulation under a statute never intended to be applied to multinational banking, the Board is studying that structure.

E. *Glimmerings of Multinational Cartels*

The Board has not yet publicly voiced concern over the possibility that the addition of significant United States arms to world-

³²⁰ Id.

³²¹ Recall that Edge Corporations and New York investment companies are not classified as "banks" for the purpose of the Act since they are not authorized to take demand deposits from the public.

³²² See note 248 *supra*.

wide banking monoliths may raise the question of restraint of global banking competition. Indeed, the Board has no mandate to consider such a problem, nor, for the moment, does anyone else,³²³ although conceivably the Lloyds acquisition of First Western Bank and Trust Company, Los Angeles, raises the issue.

An interesting aspect of the Board's section 3(a)(1) decision with respect to Lloyds' acquisition of First Western³²⁴ is its omission of any analysis even approaching that of the New York Superintendent's treatment of Barclays' size in the Barclays-Long Island Trust Company decision.³²⁵ Lloyds, with consolidated assets of 13.4 billion dollars and deposits of 12.4 billion dollars, is the fourth largest commercial bank in Great Britain; First Western is the eighth largest bank in California. The combination presumably has some impact on some markets (if only on the multinational competition between Lloyds and Barclays). The Board, however, is only entrusted with the competitive effects relative to the United States, and as the Board said in its section 3(a)(1) decision:

Since Lloyds Bank and its subsidiaries do not compete with Bank in any of the relevant banking markets in California which Bank serves, consummation of the proposal would eliminate no existing competition, nor would it have a significant effect on the concentration of banking resources in any relevant area.³²⁶

The Board's Federal Reserve System Steering Committee reviewing transnational banking is looking at business that could be considered a separate line of commerce and the original Committee chairman, Governor Mitchell, recently described the "characteristics of international banking" to the Senate Banking Committee's Subcommittee on International Finance.³²⁷ But the presumably increasing concentration in provision of global banking services, to my knowledge, has not been studied.³²⁸ To be more charitable to the Superintendent of Banks of the State of New York, perhaps something like that was on his mind when he assessed Barclays' global weight in its Long Island Trust bid.

³²³ There is a form of multinational antitrust standard in Articles 85 and 86 of the Treaty of Rome, but the day when the Charter of the United Nations will be amended to provide for review of the global competitive impact of multinational acquisitions seems a long way away.

³²⁴ Fed. Res. Press Release, Dec. 10, 1973.

³²⁵ See text at notes 132-33 *supra*.

³²⁶ Fed. Res. Press Release, Dec. 10, 1973, at 2.

³²⁷ See Wash. Fin. News at A-6 (Jan. 28, 1974).

³²⁸ For the extent to which the major European banks are increasingly combining into loose consortia, but certainly with power to act in concert, see *International Banking Gets the Team Spirit*, *Fortune*, June 1972, at 100; Dicken, *International Banking Abroad*, in *Federal Reserve Bank of Chicago, The International Monetary System in Transition* 114, 118 (1972).

But so far, all we have (and perhaps all, jurisdictionally, we can have) from the Board is a hint in the form of the questions it asked the major Japanese banks that have established subsidiary banks in the United States. In the course of 1971, Dai-Ichi Kangyo Bank Limited, Mitsubishi Bank Limited and Sanwa Bank Limited, Japanese banks each with over seven billion dollars in deposits, applied for permission to establish United States subsidiary banks, one to be located in Chicago and the other two in California. The Board was aware of the fact that, as stated by the Board in its approvals of the applications,

in general, the largest Japanese commercial banks are linked in a group with their major Japanese customers through interlocking stock ownership and that the members of these groups tend to act in concert. In particular, these groups include among their members companies that do business in the United States, notably, major trading companies accounting for a significant percentage of Japan's exports and imports to and from the United States.³²⁹

The question was how to approach the issue of the alleged "acting in concert." The Act itself sets out specific criteria for control; thus, the Board asked the Japanese banks specific questions and the replies came back: to the extent the information was available,³³⁰ only one shareholder, an insurance company, owned as much as 5.85 percent of Mitsubishi and no one shareholder held over five percent of Dai-Ichi Kangyo. None of the three banks "held with power to vote more than 5% of the stock of companies with offices, operations or activities in the United States."³³¹ The Board went further in its questioning, as evidenced by a telegram from counsel for Mitsubishi Bank in the Board's files affirming that the Bank was not a party to "any voting trust or other agreement for the voting of its shares or the shares of other corporations beneficially held by it;" counsel also affirmed that "the Mitsubishi Bank, Ltd. does not

³²⁹ Dai-Ichi Kangyo Bank, Ltd., Tokyo, Japan, Order Approving Action to Become a Bank Holding Company, 58 Fed. Res. Bull. 49 (1972).

³³⁰ A telegram in the Board's files from counsel for Mitsubishi, dated Aug. 11, 1971, noted: "The shares of the Mitsubishi Bank Ltd. are widely held and actively traded on the Tokyo Stock Exchange. For this reason specific information regarding beneficial holdings is unavailable." As for holdings in companies of the Sansui Kai by a major insurance company with, presumably, a holding in the Sanwa Bank, Limited, a letter in the Board's files, dated Nov. 17, 1971, from counsel for Sanwa notes: "This data was gathered from various Japanese publications and may or may not be accurate." Counsel for Sanwa indicated that Sanwa could not supply information about loans from the insurance company to the Sansui Kai because the information was not published "and the Sanwa Bank, Ltd. cannot obtain it in any other way." *Id.*

³³¹ Letter from counsel for Sanwa, dated Nov. 17, 1971, in the Board's files.

know of any voting trust or other agreement between other companies of the so-called 'Mitsubishi Group' for the voting of its or their shares."³³² Nothing appeared that the Board could put its finger on. The Act is very specific about the interlocks between banks and commerce that are forbidden: the language is not that of the endlessly interpretable, expandable antitrust legislative expressions. The Board, however, has not hesitated in surrounding the Act with the penumbra of Glass-Steagall. Would it then be appropriate for the Board to concern itself with the realities of the concentration of economic power represented by the Japanese groups? Another factor, however, comes into play here—the problem of exportation abroad of the United States world view. Should the economic impact of the addition to the Japanese groups of United States commercial banks³³³ be considered on a worldwide scale, or only with reference to United States economic impact? The Board split on this issue. The press release announcing the decisions made clear that any judgments as to the effects of Japanese company structure would be made only on the basis of the application of United States law to United States activities.

In acting on the applications, the Board was guided by considerations underlying its implementation of section 4(c)(9), namely, that the foreign activities of foreign-owned bank holding companies are a matter of foreign law, and the domestic activities of such companies are a matter of United States law.³³⁴

The majority of the Board, in applying United States law to United States activities, found no violation of the prohibitions of section 4 of the Act: "on the basis of the facts of record approval of the applications would not conflict with the separation of banking from nonbanking activities in this country."³³⁵

Only Governor Brimmer would have gone beyond the specific technical requirements of the Act to look at the actual facts of economic power. He dissented and would have denied all three applications on the ground that

the record before the Board fully documents the existence of a variety of relatively closed "clubs" to which key mem-

³³² Telegram from R. Briggs, Attorney for Mitsubishi Bank, Ltd., to B. Tuttle, Div. of Supervision and Regulation, Federal Reserve System, Washington, D.C., Nov. 11, 1971.

³³³ The economic potential inherent in such an establishment is demonstrated by the climb by the Bank of Tokyo's New York subsidiary in 1972, from 187th place in deposit size among United States banks to 100th, in just one year. Wall Street Journal, May 10, 1973, at 1, col. 6.

³³⁴ Fed. Res. Press Release, Dec. 2, 1971.

³³⁵ *Id.* at 2.

bers of the associated company groups belong—and which reenforce the shareholding interlocks and cross-financing patterns. I am convinced that the substantive result of these arrangements taken as a whole is a network of control which the Bank Holding Company Act of 1956, as amended in 1970, was intended to prohibit.³³⁶

Governor Brimmer would seem to have been reading the Act's prohibitions in a large sense, as incorporating the purpose of the United States antitrust standards to promote the unfettered market place. The majority of the Board made the decisions "on the facts of record," but it may well be asked how much longer the question of global impact of multinational bank establishment in the United States can or will be avoided by looking only at the questions raised by the Bank Holding Company Act.

VI. CONCLUSION

The Board has been forced to consider foreign bank entry and its implications for United States banking structure and monetary control in the context of the Bank Holding Company Act because its jurisdiction has been limited to this Act. Regulation under the Act is backhanded at best. The Board can say nobly, as it did in the press release on the approval of the three Japanese subsidiaries, that in the case of regulation of both foreign bank holding companies under the Act and of foreign activities of domestic banks

the goal is to assure sound banking in a climate of fair competition in the market place, giving due consideration to the basic concepts established by the Congress for the conduct of banking as it directly or indirectly affects the nation's economy.³³⁷

The level of abstraction of this statement is high; as soon as that level is reduced to the concrete cases of fitting a new phenomenon, the nature of which is only beginning to be explored, into the rapidly changing domestic banking structure, it is clear that Congress has *not* provided basic concepts for the conduct of banking in its present protean form, but has only provided retaining walls over which the new waves are splashing. The Board is struggling hard to channel the domestic waves and to preserve some semblance of a coherent concept of regulation of financial institutions. It is no surprise that Board decisions under the Act in foreign bank entry

³³⁶ 58 Fed. Res. Bull. 51, 53 (1972).

³³⁷ See Fed. Res. Press Release, Dec. 2, 1971, at 2.

cases have an ad hoc quality and seem to have no guiding philosophy other than the principle supposedly³³⁸ articulated in Regulation Y, section 225.4(g): the application of American law to American activities, *i.e.*, national treatment. The Board's rationale for this principle is the supposed congressional desire to assure "fair competition in the market place," fair competition, presumably, between financial institutions owned by foreign groups and those owned by United States citizens. This article has attempted to demonstrate that the notion of the unfair competitive advantage of foreign groups is largely mythical: whatever advantage the possibility of multistate branching offers is offset by the exclusion of foreigners from the possibilities inherent in the Edge vehicle. It is believed further that the notion of "fair competition" between foreign banks and domestic banks should be examined empirically. What is the "market place"? Are the institutions in fact in geographically identical and economically distinct market places?

It was suggested in connection with the analysis of Regulation Y, section 225.4(g) and the decision in regard to Banque Nationale de Paris that there may be good reason to permit foreign bank holding companies to participate in domestic businesses where such participation would not be permissible to domestic holding companies, or at least to develop separate criteria for judgment. The Board's decisions on this point have been formalistic: if over five percent of the voting stock, not permissible; no holding of voting stock, no problem (the Japanese banks). Without doubt the Board has initiated its special study of the role played by foreign banking institutions in the United States banking markets because of its own awareness of the present formalistic character of its regulation and decisions. If, as one suspects, the study indicates that the foreign-owned banks largely play a special role in a special market³³⁹—that

³³⁸ "Supposedly" is meant in the sense that Regulation Y, § 225.4(g)(2)(iv) offers an exception to the principle, but the scope of the exception is not fully spelled out.

³³⁹ As noted in the text at note 38 *supra*, California law now has special provisions for foreign bank entry. In its Weekly Bulletin, Vol. 64, No. 26, June 29, 1973, the California State Banking Department announced suspension of all applications under these provisions during the conduct, in cooperation with the Board's Steering Committee, of a study of international banking regulation by an Ad Hoc Committee of the Conference of State Bank Supervisors. The Weekly Bulletin, Vol. 64, No. 35, Aug. 31, 1973, announced that processing of applications would continue since "preliminary results of our own study and our own experience during this period clearly indicate that the scope and depth of analysis required is such that the time required for its completion is greater than originally anticipated." On Sept. 21, 1973, the Department was able to announce, in its Weekly Bulletin, Vol. 64, No. 38, Sept. 21, 1973, that it had already concluded that "the activities of representatives are qualitatively almost entirely different from the activities of domestic banks generally . . ." (My thanks are due to Dr. Bertwing C. Mah, Director of Research for the Department, for his cooperation in sending me copies of the California questionnaire and the Weekly Bulletins reporting on the study.)

they are apples and only peripherally competing with pears—then in the absence of federal legislation specifically aimed at creating order in the present morass, one can hope that the Board will exercise the unrestricted mandate given it by section 4(c)(9) and move beyond the simplistic application of the United States activities—United States law formulation to regulation of domestic activities of foreign bank holding companies in accordance with the realities of the economic impact of those activities. This would mean, for instance, that if the activities of a subsidiary bank are in reality those of an Edge Corporation—that is, if the business is in the international sector and the bank is not competing for local checking accounts³⁴⁰—the Board would not feel compelled to forbid the foreign company to have simultaneously an interest in a financial company with underwriting business. It would mean that if, in reality, the domestic subsidiaries of foreign customers of the parent bank would in any event have preferred access to funds from the bank subsidiary of the holding company, that if the meaning of the Act's separation of banking and commerce is not at stake, then financing participations in such domestic subsidiaries need not be automatically denied.³⁴¹ Hopefully, once function is fully described, regulation will be able to be better adapted to function.

The Board has announced that its study is not dealing with the problems of monetary flows. Nevertheless, the issue of the function in the monetary area of the domestic arms of foreign multinational banks is crucial. The concomitant of more precisely adapted regulation under the Bank Holding Company Act is regulatory jurisdiction in the Board over all institutions having sufficient access to the international money markets so as to be able, by their international

In his testimony before the Senate Banking Committee's Subcommittee on International Finance reporting on the progress of the System Steering Committee's study of foreign institutions, see text at note 2 *supra*, Gov. Mitchell gave indications that the study also is finding that the United States offices of foreign-owned banks have, in general, a different business mix than domestic banks. For a reprint of this testimony, see Wash. Fin. Rep. at A-6 (Jan. 28, 1974). See especially page A-9.

³⁴⁰ In the *Banco di Roma* decision, see text at notes 313-20 *supra*, the Board stressed the unfair competitive advantage the Chicago bank would have in having an underwriting arm to offer an alternative source of financing to its customers. Glass-Steagall was not aimed at *this* problem at all; the supposed competitive advantage arises only because member institutions that take demand deposits are forbidden to have underwriting affiliates or to underwrite. There is no prohibition on the affiliation, for example, of a small loan company, a factor or a mortgage company with an underwriting company, so long as no one of the group raises its loanable funds by taking demand deposits from the public. If the foreign bank holding company subsidiary "bank" is not so raising its funds, there is no reason mechanically to apply Glass-Steagall.

³⁴¹ On the other hand, if the economic reality is identical to the domestic situation which Congress has proscribed, joint ownership of a bank and industrial companies with the bank acting as a funnel for deposits to finance the industry, then foreign ownership should be no bar to application of the prophylactic.

transactions, to impede the Board's leverage on domestic economic management. This paper has not attempted to discuss the possible application of Regulations D and M, the regulations under which the Board acts on the United States economy through control of commercial bank reserves, to foreign banks in the United States; on the contrary, the paper has assumed that adequate jurisdiction in the Board for this purpose must be a legislative objective, whatever the feasibility of a general federal overhauling of the regulation of foreign bank entry.

In the best of all possible worlds, a rational Congress would have the time not only to consider the legislative proposals President Nixon has submitted in response to the Hunt Commission report,³⁴² but to consider and adopt legislation dealing directly with foreign bank entry. The aim of the legislation would be to so reorder the present morass of statutes as to create the greatest possible number of options for foreigners wishing to risk their capital in the United States banking and financial markets—in short, to rationalize the current structure so as to encourage international investment in this sector. Since the United States as a domestic policy matter regulates the field of banking in a manner naturally tending to discourage foreigners, the proposal of such legislation raises the dilemma of how to encourage without favoring the foreign over the domestic institution. The solution runs along the line hinted at by the Board in the Regulation Y, section 225.4(g) special provision for the domestic company “facilitating international commerce.” To the extent the foreign institution is entering to extend its own foreign and international business, to establish a United States arm of its worldwide business, it is entering a highly specialized market in the United States to which most of our concepts of banking regulation have little application.³⁴³

Congress recognized the special nature of this market in 1916 by authorizing national banks to invest in “corporations . . . principally engaged in international or foreign banking”³⁴⁴ The authorization was hardly ever used, however, because the state corporation laws generally did not have provisions for such specialized creatures and the more general banking charters were not appropriate for national bank investment. The solution was to provide federal vehicles for entry into the market, the Edge Corporations. The point about both so-called Agreement Corporations and Edge Corporations is that, in recognition of their special character

³⁴² Wash. Fin. Rep. at A-15 (Aug. 6, 1973).

³⁴³ On the other hand, our antitrust notions might have great relevance if applied so as to judge the economic impact on the global market of the size of the initial entry.

³⁴⁴ 12 U.S.C. § 601 (1970).

and business, they have been exempted from subsequent banking regulation. Edge Corporations are not subject to Glass-Steagall restrictions on affiliation with securities corporations. Edge and Agreement Corporations are not "banks" under the Bank Holding Company Act. The Edge Corporation, as a federal corporation, presumably has whatever immunities from state regulation that a national bank has. The Agreement and the Edge Corporation, however, are designed to take domestic institutions into international banking and banking in countries other than the United States. In the case of the Edge Corporation, Congress solved the problem of unfair competition with more severely regulated domestic institutions by simply providing in the Edge Act that no corporation organized under its provisions should "carry on any part of its business in the United States except such as, in the judgment of the Board of Governors . . . shall be incidental to its international or foreign business" ³⁴⁵

As we have seen, the Board in Regulation K has given a relatively restricted meaning to this language and has applied the restriction to Agreement as well as to Edge Corporations. The line of distinction between permissible and impermissible domestic activities presently drawn in Regulation K would not seem to be appropriate for United States vehicles of multinational banks. So long as such vehicles restrict their business to banking and financial services (including, for example, domestic payroll accounts and export management services) for United States customers principally engaged in foreign and international business, and for foreign customers and their United States subsidiaries, the business would seem to be sufficiently restricted so as to obviate a claim of unfair competition with domestic institutions. ³⁴⁶ In any event, the problem of unfair competition could be dealt with by offering this particular option to foreign banks on an exclusive basis; that is to say, the vehicle could not be used if the foreign bank otherwise established a branch or subsidiary bank whose scope was not so limited. Given this restriction, however, this kind of *reverse* Edge Corporation should not be faced with any geographic restrictions; the foreign institution should be allowed to have any number of such subsidiaries (or branches of such subsidiaries) at any location desired. As participants in the international and foreign commerce of the United States, the vehicles should also be free of state regulation.

³⁴⁵ 12 U.S.C. § 616 (1970).

³⁴⁶ Those United States banks that have established Edge Corporations in multiple locations to serve this market might, however, have a legitimate complaint. If this were determined to be so, the limitations on the foreign banks' vehicles could be drawn so as to permit only those services that an Edge Corporation could offer domestic customers while permitting a full range of services to accounts originating from abroad.

These vehicles would have to be created by separate federal legislation; at the same time, however, the Edge Act should be amended to permit incorporation of these more limited vehicles by foreigners who do not choose to limit their banking activities in the United States to the new vehicles (the Edge Corporation option should not be on an exclusive basis) or who would like to undertake a joint venture with an American institution.

To the extent that the foreign investor does not wish to restrict its United States banking operations to those related to its foreign and international business, but rather wishes to establish an entity to compete fully in the United States domestic banking market, it should at that point become subject to United States rules in its United States activities. The new subsidiary—or branch—should be treated as a “bank” under the Bank Holding Company Act, be subject to Glass-Steagall, geographic restrictions, etc. The only changes in the present state of the law that would be necessary would be (a) to amend the Bank Holding Company Act to apply to the establishment of a branch of a foreign bank that is to operate in essence as a domestic bank (including amendment of the Federal Deposit Insurance Act³⁴⁷ to permit insurance of the branch’s deposits); (b) to amend the Edge Act as noted above; and (c) to settle by legislation the question raised by the New York *Barclays* decision, the power of the states to protect domestic banks by veto over a foreign bank’s proposed acquisition. It should be noted that to forbid such a veto is *not* to destroy the dual banking system: if the bank to be acquired is a state bank, it will be subject to state regulation as usual. Moreover, these proposals in no way preempt the states’ present right to provide for the possibility of foreign bank entry by branching legislation; they would merely end the anomaly that choice of form should dictate results under the federal legislation.

³⁴⁷ Ch. 967, 64 Stat. 873 (1950) (codified in 12 U.S.C. §§ 1728(b), 1811-31 (1970) and in scattered sections of 18 U.S.C.).